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PLANNING FOR FREEDOM [1]

How to reconcile freedom and planning in contemporary democratic societies is one of the basic problems of our time. Enthusiastically or reluctantly—depending upon political and social beliefs—all but a small hard core of last ditch resisters, led by Professor Hayek, have conceded that a high degree of planning is the inevitable concomitant of industrialised and urbanised societies. Indeed, it may well be argued [2] that the Kantian definition of law as " the aggregate of the conditions under which the arbitrary will of one individual may be combined with that of another under a general inclusive law of freedom " opens the way for law as an instrument of planning designed to ensure the protection of individual freedom from encroachment by others.

The problem that has occupied some jurists, economists and political philosophers in recent years is at what point the line is to be drawn, how far planning by the central authority of the state can go without injuring vital freedoms, without leading to a concentration of unchecked power that is bound to end in dictatorship. A large part of this discussion has centred around the problems of the limits of administrative discretion.[3]

To this wider problem of the reconciliation between planning and freedom under the rule of law Dean Rostow's important book does not address itself. Only one, rather cursory, chapter on " The Goals of Legal Action in Controlling the Economy " deals with the function of law as an instrument of social change. Dean Rostow is concerned with a more limited, specific, and in part

1 *Planning for Freedom, the Public Law of American Capitalism*, by Eugene V. Rostow, New Haven, Yale University Press, 1959; London, Oxford University Press, 1960.

2 Contrary to the implication in Dean Rostow's book, at p. 365.

3 For opposing views on this problem see on the one side Hayek, *The Road to Serfdom* (1943), Chap. 7, and *The Constitution of Liberty* (1960), p. 205 *et seq.*, or Keeton, *The Passing of Parliament* (1952); on the other side Jennings, *The Law and the Constitution*, Chaps. VI, VIII; Friedmann, *Law in a Changing Society* (1959), Chaps. 11–13, 16; Jones, " The Rule of Law and the Welfare State," 58 Col.L.Rev. 149 (1958).

highly technical, field: the analysis and vindication of the instruments of legal action available to contemporary American society, " the public law of American capitalism," in directing, by deliberate stimulation, restriction or regulation, the flow and development of the American economy. The importance of the book is twofold. In the first place it is, as indicated by the title, an open and unembarrassed admission, by a distinguished lawyer-economist, of the function of planning in a free society. And if such an attitude should appear somewhat obvious in other Western societies, this is not so in the United States. Although American society has, in the quarter of the century that has elapsed since the first New Deal Presidency of Franklin D. Roosevelt, accepted many aspects of the modern welfare state, a comprehensive system of social security, unemployment insurance, the elaborate regulation of industries, and a far greater amount of public enterprise than is generally admitted, the words " planning " or " welfare state " still send a shudder through the spines of most businessmen, politicians and a considerable section of the public. Emotionally, these words mean the New Deal, the T.V.A., high taxes for various social purposes, the rise of organised labour and other facets of modern American life which have long been accepted in fact, and the disappearance of which would almost certainly cause a major national upheaval, but which are emotionally resisted as inroads on the " American way of life."

In the second place Dean Rostow's analysis is the most important attempt yet made to analyse the mechanism, as well as the merits and deficiencies, of the major instruments of economic control presently at the disposal of the American Government. The bulk of the book is devoted to an analysis of what Dean Rostow calls " the primary tools of control: fiscal and monetary policy," and the " secondary tools of control: free and regulated markets." This analysis is preceded by a chapter of preliminary observations. These stress the need to see law as an instrument of social change which cannot be " isolated from the flow of social experience and the moral code, which give it life." More important for an understanding of the subsequent analysis is Dean Rostow's view of the American economic order " as a system of law," as a system of offsets where the decision-making process is necessarily diffuse. The goal of the use of governmental powers in the regulation of the economic processes is therefore " to counter-balance trends towards inflation or deflation which are bound to develop from time to time in a free economy." The general theme is set by the Employment Act of 1946 (reproduced in the appendix), described by the author as one of the most important statutes of this generation. The Act declares it to be the obligation of the national government to use all its powers in order to create and maintain " conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing and seeking to

work, and to promote maximum employment, production and purchasing power." This goal is to be sought in ways which " foster and promote free competitive enterprise." The question whether and by what means this goal, fully accepted by the author as an expression of the social philosophy of contemporary America, can be achieved, and whether its twin purposes are compatible, is the main theme of the book.

In Dean Rostow's analysis, there are now three major tools of the law of economic planning. The first is fiscal and monetary policy. By the use of this instrument " the government and the Federal Reserve system should see to it that money is being spent for goods and services of various kinds in a volume sufficient to assure high levels of useful employment, without precipitating the pressures of general inflation. Drawing upon the improved modern analysis of national income, this policy relies on the hydraulic pressure of an adequate level of spending to elicit the most valuable possible combination of outputs from the economy at full employment."

The second major tool is the principle of market competition, policed by anti-trust laws. This is both an affirmation of the principle of competition, and the admission that without policing, an unsupervised competitive economy is apt to produce distortions, monopolies and other abuses.

The third major element in the planning system is " the set of tools which is being developed to cover the negotiations between business and organised labour, and otherwise to fix certain key aspects of the labour market."

In Dean Rostow's view, these three sets of institutions are not just disparate elements.

> " The unifying force in this system derives from the changes which have been accomplished during recent years in thinking about monetary and fiscal policy, and in the practice of these governmental arts. What combines these three disparate bodies of law and custom into a dynamic whole is the proposition, implied in the Employment Act, that the Government can and should achieve a considerable degree of stability in spending and employment through the judicious use of fiscal and monetary policy. Reliance on fiscal and monetary policy as the Government's chief positive weapon of stabilisation has vital implications for the rest of the economy. By occasional action in this limited sphere, the Government could keep prospects for profit generally favourable, without allowing the feverishly high profits of inflation to appear. Thus, in the main, Government could safely rely on the decision of business and labour to determine the actual course of production in the private sector of the economy.
>
> " What is novel in this conception of planning is the idea that employment stabilisation is the decisive purpose of monetary and fiscal policy. This conclusion rests on the proposition,

> . . . , that the free enterprise system does not of itself invariably achieve equilibrium at full employment. No degree of competition can protect a free-enterprise and free-labour society against booms and slumps. Such deviations are not errors, to be blamed on excessive monopoly in labour or product markets, or other forms of ' sin,' but are inherent in the process by which cumulative opinion can lead to excessive or inadequate levels of total spending. The free markets of a capitalist economy lack a balance wheel. This only the Government can provide, through fiscal and monetary action. There are no alternative means in a free economy to smooth otherwise inevitable fluctuations in the volume of private and public spendings, and therefore in employment and production."

An adequate programme for the public control of business requires in the author's view the formulation of at least five economic policy objectives, in addition to the vitalisation of employment: (1) A programme to determine whether the Government should use its monetary policy and its tax system to favour more or less savings in capital formation. (2) The formulation of criteria to determine under what circumstances the state should supplement and supersede the market as a regulatory mechanism, or undertake the direct provision of goods and services itself. (3) Equity in the distribution and redistribution of wealth and income, in other words, a decision how egalitarian economic policy should be. (4) A policy on the general level of prices as an essential aspect of economic stability. (5) And more recently—the formulation of the foreign policy goals of the economy, *i.e.*, of the extent to which foreign policy has a legitimate claim on the available national economic resources.

As will be shown later, these various goals are very unevenly developed in the present book. Its substantive treatment is far more restricted than the formulation of the objectives given in the introduction. The bulk of the book is in fact devoted not to the wider problem of policy choices but to the discussion of the mechanisms of budgetary, fiscal and market controls, and their influence on the level of national income and the state of employment.

It is evident from the foregoing that the author is essentially an adherent of the Keynesian approach to the function of government in modern capitalist society. He rejects with equal emphasis the belief that a return to " free " economic enterprise, with all its inevitable corollaries of booms and slumps, great inequalities of wealth and income, and total insecurity, is the only, or indeed a possible, way of preserving freedom, and the opposite socialist conception of planning. While the book is explicit, lucid and convincing on the former alternative, it is somewhat vague and casual on the latter. When Dean Rostow asserts, for instance, that " it would by now be apparent, both in theory and practice, that democratic socialism is a contradiction in terms," he is

uncharacteristically ambiguous. Apparently Dean Rostow has in mind the complete centralisation of economic power in the state, as exemplified by the economic system of the Soviet Union and even more of Communist China. Apparently he accepts a " mixed economy," with a degree of public ownership in certain fields and, unlike a majority of his fellow Americans, Dean Rostow even concedes that public enterprises can be as good or bad as private enterprises. However, Dean Rostow leaves it very uncertain what he means by " democratic socialism." In Great Britain or India it has meant the socialisation of basic industries, largely through semi-autonomous public enterprises, together with the maintenance of a private enterprise system for the rest of the economy, though not without important control functions of the state. In Sweden, on the other hand, the country with the longest record of Social-Democratic government, democratic socialism has meant a minimum of public enterprise, except for the highly efficient and admirable state-run railway and forestry services, but a high degree of state control over regulated monopolies and an extremely comprehensive social welfare system including national health services. Under neither of these systems has there been any impairment of democracy or freedom, comparable even with the attacks on democracy and freedom which threatened the United States in the early fifties.

The great value of the book lies not in these somewhat cursory asides but in the masterly analysis of the American system of monetary and fiscal controls. Only professional economists are qualified to review or criticise this part of Dean Rostow's book adequately. It is at the very least a most illuminating introduction for the non-economist to the elements of fiscal and monetary instruments and policies in the United States.[4] The gist of this analysis—supplemented by a later chapter on the fiscal experience and record of fiscal and monetary intervention in the economic process in the post-war years—is that the economy does and should respond to a rise or fall in the level of money incomes, and that the level of income is influenced by budgetary and monetary policies. This general thesis is, however, qualified by detailed demonstrations—textual, graphic and statistical—that the kind and extent of governmental intervention, through these two instrumentalities, varies greatly with the stage of the trade cycle at which pressure is applied. It also " depends a good deal on how the form of spending affects businessmen's view of the future."

This whole analysis is a skilful blend of technical, psychological and social aspects of a complex mechanism; it does, however, lead the author to the emphatic conclusion that, if applied at the right moment, a combination of budgetary policies and the control over lending and interest rates exercised by the semi-autonomous

[4] The book has mainly grown out of the author's introductory law school course on the public control of business.

Federal Reserve Bank system can reduce the disturbing alternations between excessive booms and severe depressions to a minimum. That this is a desirable social goal, the author does not doubt.

The other major part of Dean Rostow's analysis is devoted to the law of market organisation. Most of this consists of a critical survey of the anti-trust laws, while a few challenging pages are devoted to a critique of the regulation of industry by supervisory administrative agencies. The Sherman Act was enacted in 1890, and the first of the federal supervisory agencies, the Interstate Commerce Commission, was established in 1887. Since the end of the nineteenth century—and more definitely since 1914, when, under Woodrow Wilson's presidency, the Federal Trade Commission was established as the second regulatory agency, and the Clayton Act was passed to supplement the Sherman Act by the control of mergers and the prohibition of price discrimination, these two legal methods of official control and regulation of a competitive economy have dominated American thinking. The psychological importance of anti-trust, and the role it plays in the legal system, is difficult to comprehend fully outside the United States, even though such notable enactments as the British Restrictive Trade Practices Act of 1956 and the German *Wettbewerbsgesetz* of 1957 demonstrate the extent to which anti-trust thinking has begun to influence the legal systems of other countries. The administrative regulation of competition by supervisory agencies is the counterpart of anti-trust in the field of administrative law. Indeed, the function and structure of these agencies has so much dominated the growth of American administrative law that the wider problem of the legal relationship between public authority and the individual has almost no place in this discipline as understood in the United States.[5] Dean Rostow is an emphatic supporter of anti-trust law as an instrument of market control, but a strong critic of the present system of administrative regulation which, in his opinion—though developed only in general outline—cramps the competitive potential of the regulated industries. It is the manner rather than the principle of supervision that he attacks, and it is perhaps of interest in this context that one of the first studies commissioned by the Kennedy administration is a critical survey of the whole system and functioning of the federal regulatory agencies.

The enforcement of anti-trust has gone through several cycles. After an initial period of vigorous enforcement, leading to the dissolution of huge monopolies, especially in the railroad and oil industries, anti-trust sank into a decline, notably in the second and third decades of the present century. During the great depression and the early phases of the New Deal, when the chaos of the

[5] For a criticism of this limited concept of public law see the present writer's *Law in a Changing Society* (1959), Part 4.

economy impelled both business and government to seek protection, consolidation and price maintenance at almost any cost, anti-trust ceased to be an effective instrument of legal policy. It experienced a notable revival when Thurman Arnold became head of the anti-trust division, and it has remained a vital factor in public law and business policy ever since. This does not mean that there has not been, and continues to be, a vigorous divergence of opinions both on the proper interpretation and on the general usefulness of anti-trust. David Lilienthal has perhaps been the most outspoken critic of the whole concept of anti-trust, as one that impedes scientific, technical and organisational progress. Adolf Berle believes that the modern corporation has developed a " corporate conscience," and that this development of a quasi public responsibility mitigates the dangers of excessive concentration of corporate power. He does, on the other hand, advocate the application of constitutional provisions to the corporations precisely because they now exercise a great deal of quasi public power.

Dean Rostow will have none of this. He is highly critical of the alleged conscience of the modern managerial corporation, and he regards the fact that admittedly some of the big manufacturers, in the scarcity of the immediate post-war years, did not raise their prices as much as they could have done, as an economically and socially bad influence, which helped to distort the flow of the market forces. The author also regards the controversy between the advocates of the " rule of reason " and the advocates of *per se* rules as largely artificial. In practice only major cases of injurious restrictions or monopolisation are selected for civil suit, let alone for criminal prosecution. And for all the hundreds of vacillations and doubts that emerge from the almost unmanageable mass of anti-trust decisions, certain basic and generally accepted rules emerge as to the presumption of illegality of certain practices (such as price discrimination, exclusion of newcomers, rigged bidding, etc.).

Dean Rostow strongly approves of the DuPont decision [6] in which a divided court held DuPont's 23 per cent. equity in General Motors to be a violation of the Clayton Act. On the whole he believes that

> " Despite notable weaknesses in certain areas of anti-trust law doctrine, particularly those affecting the process of merger, the influence of the anti-trust laws on the organisation of American business has been important. The structure of industry has enormous historical momentum. The anti-trust laws cannot accomplish miracles, but they can and do help to guide the trend in a more competitive direction."

It may be conceded that, while the concentration of economic power in a few hundred large corporations is a dominant factor in

[6] *U.S.* v. *E. I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957).

modern American economy, monopoly has not increased, and has probably decreased, as compared with half a century ago. While only very partially successful in restoring a régime of free competition, anti-trust has helped to keep economic opportunities open and to counteract the concentration of economic power. Its effects occur largely outside the court room, in the restraint on business decisions.[7] The relevance of Dean Rostow's views is underlined by the increasing seriousness with which anti-trust law is now being applied in countries formerly hostile to the whole idea such as Britain and Germany.

Here then is an important and lucid analysis of the ways in which modern capitalism can function through the judicious application of certain public law controls, without the destruction of either a vigorous competitive economy or the threat to freedom that complete planning of the economy poses. Yet it seems to this writer that the book is more a vindication of policies developed over the last generation in response to various economic and social crises than an answer to the new challenge that now increasingly confronts the United States. In his general outline of the programme for the public control of business, the author raises the question of the criteria that should guide the government in its preference between consumer goods and education, luxury services and slum clearance. Repeatedly, throughout the book, Dean Rostow stresses the importance of better public education, of more adequate social services, of the conservation of national resources. But his whole substantive analysis seems to ignore the problem how this can be done with the legal controls that he regards as sufficient. Like the majority of his fellow countrymen he seems to believe that the encouragement of economic growth as such is the goal. Despite a number of sympathetic references to Kenneth Galbraith's *The Affluent Society* Dean Rostow does not tackle the problem so clearly put in that book that increase of production or the percentage growth of the economy as such is not the basic problem but rather the distribution of resources according to social priorities. This, in the present writer's opinion, was the most significant issue in the recent presidential elections. In terms of quantitative production estimates the golden toothpick ranks equally with agricultural produce or defence installations. How is the necessary transfer of resources from conspicuous consumption to vital needs to be effected, since the latter belong mainly to the public sector and the former to the consumer-directed private enterprise economy? The author says that " competition should serve society better than monopoly in directing resources

[7] I have recently sought to show that the indiscriminate application of domestic anti-trust standards to international business transactions can lead to very undesirable consequences in the international field (Friedmann: " Anti-trust Law and Joint International Business Ventures in Economically Underdeveloped Countries," 60 Col.L.Rev. 780 (June 1960)). See also Brewster, *Anti-trust and American Business Abroad* (1958).

to the uses consumers prefer " (p. 270). How is this to be reconciled with his outline of the criteria for the degree to which " the state should supplement or supersede the market as a regulatory mechanism "? (p. 26). If Dean Rostow has an answer he has not given it in this book. A possible answer would be the use of the federal taxing power for the redistribution of resources. But while this would certainly be used to a greater extent than at present in a period of grave depression or some other national emergency, the built-in constitutional limitations on the exercise of federal powers, *vis-à-vis* state and local governments, especially in the field of education, represent a severe, though by no means the only, obstacle.

A second comment is directed to the implication rather than the express thesis of this book. While it is avowedly confined to an analysis of public law controls in the American system, there are sufficient critical observations on socialist and semi-socialist planning to lead many readers to the conclusion that what is good for the United States is good generally for the development of a vigorous economy. One of the principal problems facing the economic aid policy of the Western world and of the United States policy in particular is, however, whether the very principles that are taken for granted in the mature United States economy—though even there they may well prove insufficient for the next decade—are at all applicable to the underdeveloped countries. The predominant American belief that the principles of free enterprise, with a minimum of entrepreneurial state functions, furnish also a desirable policy for the underdeveloped countries, has done much harm to the foreign investment policy of the United States. Almost all serious and unbiased students have come to agree on the vital function of state enterprise in underdeveloped economies as the indispensable foundation for the development of private enterprise. (See, *e.g.*, A. H. Hanson, *Public Enterprise and Economic Development* (1959), *passim*, and Andrew Shonfield, *The Attack on World Poverty* (1960), p. 136.) It is of course quite possible that Dean Rostow shares this belief, and he certainly stresses the great importance of foreign economic policy as one of the principal factors in the contemporary American economy. But he leaves the implication that central planning and a directing role of the state in any stage of the economy, are bad in principle.[8]

Finally, there are some wider problems on the borderline of economic and social policy. Is it either possible or desirable that the production capacity of the United States should or could grow without a basic reorientation of objectives? Can the use of the present steel capacity, for instance, be expected to grow from the present level of 50–60 per cent. to full use, without major action

8 *Cf.*, on the stimulating effect of the state-owned, semi-monopolistic ENI in Italy, *The Economist*, November 5, 1960, p. 572.

by the state in diverting productive resources from a third motor-car in the family, or more luxury construction, into school construction or public housing? Somewhere Dean Rostow casually observes that there is no evidence that the American economy depends on the defence industry to a considerable extent. We must ardently hope that this is so, but the assumption is not tested.[9] There is no doubt that a drastic reduction of defence contracts would mean a very major reorientation in the American economy. And while it would theoretically be possible and desirable to transfer the resources thus released to other public purposes, such as education, housing, medical care, or international economic aid, in fact the obstacles to such redirection are formidable. Congress and public opinion will readily respond to calls for heavy defence expenditure, which evoke national loyalties, and anti-Communist sentiment. But the provision of public funds for any other purpose encounters sharp divisions of political and social philosophy as well as deep-seated distrust of the extension of federal power in spheres regarded as sacrosanct by state and local governments. And does the spread of automation not raise basic problems not only as to the social structure of the labour force but also to the relation of working life and leisure hours, with consequences hardly yet probed?

Obviously Dean Rostow is well aware of these problems, and he may well answer that the present book has more limited scope and objectives. But its title is *Planning for Freedom*. The questions posed by this title are certainly greater than the answer given in this brilliant and important book. We can only hope that the distinguished author will follow it up by an analysis of the wider and greater challenge to the function of government and public law in the control of the economy which the free world will face in the 1960s.

W. Friedmann.*

[9] The grave problems that even a partial and phased disarmament programme would produce in the American economy have recently been outlined by E. Benoit, "Economic Adjustment to Disarmament," a report to the Committee on Research for Peace, Institute for International Order (1960). Without question the effect on regional employment, on sustained research, on the level of industrial productivity, and perhaps on economic growth, would be severe without a national planning authority, whose function would vastly exceed those contemplated by Dean Rostow. The problem links with that mentioned earlier: the great difficulty, in the American constiutional and political structure, of transferring resources from one sector of the private economy to another, and even more from the private to the public sectors of the economy.

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RESALE PRICE MAINTENANCE AND THE RESTRICTIVE TRADE PRACTICES ACT, 1956, S. 25

"A Condition as to the Price at which those Goods may be Resold"

An important exception to the common law rule that restrictive conditions cannot be made to run with goods has been made by section 25 of the Restrictive Trade Practices Act, 1956.

> "25—(1) Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold, either generally or by or to a specified class or person, that condition may, subject to the provisions of this section, be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."

It will be submitted first that unless a strong court is prepared to give to the words "price" and "resold" meanings very much wider than those in common use,[1] considerable gaps may appear in the section. Widespread avoidance may, however, be not undesirable, since no obligation is placed on the supplier to maintain his prices fairly, and dealers are prevented from combining to withhold orders from those not doing so. Secondly, if considerable use is made of section 25 in trades with many retail outlets, it may be very difficult to detect price-cutting before substantial supplies have been delivered, and it may not be easy to prove and measure any loss, when large-scale infringements are discovered. It will be suggested that the best way to deal with the problem is to insert clauses fixing a pre-estimate of liquidated damages as part of the "condition as to the price at which those goods may be resold" and to draft all injunctions widely.

The section contains several important words of uncertain extent, so problems of construction may be expected to arise. Harman J. in *County Laboratories* v. *J. Mindel Ltd.*[2] observed "that it is a section limiting the freedom of trade, and, therefore, although I am bound to give it that effect which the language of it expresses, I am not prepared to go beyond that and stretch it so as to produce an effect which the express language does not warrant."[3] Upjohn J. in *Goodyear Tyre and Rubber Co. (G.B.) Ltd.* v. *Lancashire Batteries Ltd.*[4] agreed with this and decided that

[1] That is, to analyse as combined sales transactions which superficially appear to be sale plus gift.

[2] L.R. 1 R.P. 1 at p. 5.

[3] So he decided that it should not be given retroactive effect.

[4] L.R. 1 R.P. 22 at pp. 27–28.

notice meant actual knowledge. When the Court of Appeal reversed this decision,[5] it gave no guidance as to the construction of other parts of the section, although Romer L.J. did refer to commercial common sense.[6] Yet the width of its interpretation will become very important when we consider avoidance of its provisions, which at first glance appears very easy.

Any common law freedom to cut prices before the Act, was in fact considerably curtailed in many trades by the operation of stop lists, whereby price-cutters might find their supplies of goods from most, if not all, manufacturers within a trade stopped. To avoid this ultimate sanction most price-cutters were prepared to submit to paying penalties.[7] The organisation of such lists, if fair, was held to be neither tortious [8] nor criminal [9]; so there was little opportunity for anyone aggrieved to appeal to the common law courts.[10]

Such action has now been made illegal, though not criminal,[11] by section 24, which also prohibits dealers from agreeing to withhold orders from suppliers who do not impose or take steps to enforce resale prices. It is not however proposed to consider the section in detail, save in so far as its provisions must be taken into account in any attempt to avoid section 25, nor the provisions as to registration and the jurisdiction of the Restrictive Practices Court.[12] Further provisions restrict the application of section 25

5 The court derived considerable guidance from the ticket cases, and by, as it were, incorporating a substantial body of case law, has lessened the area of uncertainty in relation to the word "notice." The decision was noted in (1958) 21 M.L.R. 682 by Mr. C. Grunfeld.

6 At p. 41.

7 For the schemes operated in 15 industries, see the short summaries in Part II of the Lloyd Jacob Report on Resale Price Maintenance (1949) Cmd. 7696 (hereinafter called the Lloyd Jacob Report).

8 *Thorne* v. *Motor Trade Association* [1937] A.C. 797, *Ware and de Freville* v. *Motor Trade Assocn.* [1921] 3 K.B. 40, for the protection of the resale price was a legitimate trade interest, pursued by lawful means, even where it involved placing or threatening to place on the stop list the name of a trader who was not bound to maintain his prices, either by a contract with the manufacturer, or by being a member of the association organising the list.

9 Within the Larceny Act, 1916, s. 29 (1), for although money was demanded with menaces, the demand was not without reasonable or probable cause.

10 Whether or not he were a member of the association, he would have to show either (1) that its rules were contrary to public policy, (2) that the tribunal had infringed them, or (3) that it had not observed the rules of "natural justice." See the Report of the Monopolies and Restrictive Practices Commission on Collective Discrimination (hereinafter called the "Collective Discrimination Report") (1955) Cmd. 9504, para. 168. In any of these cases the demand for penalties might be contrary to the Larceny Act (see *supra*, note 9) and the conspiracy therefore illegal and tortious (see *supra*, note 8).

11 s. 24 (6).

12 The provisions as to registration and the Restrictive Practices Court are very important and are considered in relation to resale price maintenance by Professor B. S. Yamey, "The Investigation of Resale Price Maintenance under the Monopolies Legislation" [1958] *Public Law* 358. The court has recently decided against a scheme involving, amongst other matters, a secret agreement to fix prices individually in *Re Motor Vehicles Distribution Scheme* [1961] 1 W.L.R. 92; [1961] 1 All E.R. 161. It did not have to consider the individual imposition of retail prices by manufacturers in *Re Wholesale Confectioners' Alliance* [1961] 1 All E.R. 116, a case concerned with wholesalers' discounts and to which the manufacturers were not parties. The problem may

to persons who acquire the goods for the purpose of resale, so excluding the consuming public from its ambit and others exclude sales under court order or on insolvency, but not closing down sales nor those of damaged or unfashionable goods, though such sales are less likely to be forbidden by the supplier.

Before coming to the English statute, it might be of interest to consider the position in the United States, which has had almost thirty years' experience of statutes allowing the enforcement of resale price maintenance in the courts, even where there was no contractual relationship between the parties.

Resale Price Maintenance in North America [13]

In the U.S.A. there has been considerable controversy as to whether resale price maintenance, or " fair trade " as it is euphemistically called, is desirable and the shifts in opinion have been reflected in legislative reforms. The first relevant statute to be enacted was the Sherman Act, 1890, section 1.

> " Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

In inter-state commerce any resale price maintenance agreements whether vertical or horizontal [14] were therefore misdemeanours [15] and combinations not amounting to agreements might also contravene the section, making it difficult to enforce resale price maintenance without infringing the Act.[16]

be raised more overtly by the net-book agreement which has been referred to the court.

It is not proposed to deal with the difficulties involved in defining " those goods," for instance the distinction between goods and interests in land, or choses in action; nor with the problems that might arise if dealers in bulk should impose minimum prices and the goods were later mixed with other goods. The meaning of " notice " was considered by C. Grunfeld, see *supra*, note 5.

[13] Since many of the cases considered were decided in state courts, reports of which are available in few English libraries, periodicals and case books will be frequently referred to, *e.g.*, L. Schwarz, *Free Enterprise and Economic Organisation*, 1952, Foundation Press; S. C. Oppenheim, *Federal Anti-trust Laws*, 1959, West Publishing Co. An interesting recent discussion of the U.S. law together with some economic arguments for and against resale price maintenance has been written by A. D. Neale, *The Anti-trust Laws of the U.S.A.*, 1960, Cambridge U.P., Chap. XI.

[14] A vertical agreement is one whereby the manufacturer or other supplier imposes conditions affecting the goods down the distribution chain: a horizontal one is an agreement between manufacturers or traders of the same type, *i.e.*, between manufacturers, or between wholesalers, or between retailers.

[15] *e.g.*, *Dr. Miles Medical Co.* v. *John D. Park and Sons* 220 U.S. 373 (1911), Schwarz, p. 520, Oppenheim, p. 186.

[16] In *U.S.* v. *Colgate & Co.* (250 U.S. 300 (1919), Oppenheim, p. 191), a single manufacturer refused to sell to dealers who cut prices and so effected vertical resale price maintenance. Since no agreement with dealers was alleged in the indictment, it was held to be bad. The case was distinguished in *F.T.C.* v. *Beech-Nut Packing Co.* 257 U.S. 441 (1922), Schwarz, p. 545, Oppenheim, p. 197, where an agreement with wholesalers was implied from co-operation

The first state to pass a " fair trade " law enabling certain types of vertical resale price maintenance agreements to be made was California in 1931.[17] Two years later it was amended to include a " non-signer " clause whereby actions could be brought against distributors not party to the contract who cut prices wilfully and knowingly. Fourteen other states followed suit, but the progress of " fair trade " was delayed by doubts as to the constitutionality [18] of such laws. In 1936 one was upheld by the Supreme Court [19] and the flood-gates were opened; in the following year twenty-eight states passed " fair trade " laws containing non-signer clauses. Now only Texas, Vermont and Missouri of the old forty-eight states and the District of Columbia have never had " fair trade " statutes, and while the Supreme Courts of Nebraska and Utah have declared the whole statute unconstitutional, about a quarter of the states have no valid non-signer clause.

However, as state " fair trade " laws could not affect interstate commerce which is a federal matter, and in that sphere the Sherman Act had made resale price agreements criminal, they could be enforced in the courts only where the whole chain of contracts from that imposing the resale price to that under which the goods were finally resold took place within a single " fair trade " state. In 1937 the Miller Tydings amendment to the Sherman Act exempted from its provisions certain types of vertical resale price maintenance agreements. This amendment, hurriedly passed as a rider to the appropriation bill for the District of Columbia,

not dissimilar to that given in the *Colgate* case. However, the latter is not dead, as no agreement was implied in *U.S.* v. *Parke, Davis Co.* 164 F. Supp. 827, D.D.C. (1958); noted 27 Geo.Wash.L.Rev. 260, Oppenheim, p. 196. For comments on this line of cases see H. Lackshin (1958) 36 Texas L.R. 799; R. J. Dittrich Jr. (1958) 56 Mich.L.Rev. 426.

[17] See Oppenheim, p. 181. Resale price maintenance by notice affixed to goods dates from 1914 in New Jersey.

[18] Their validity has been challenged on three grounds: (a) that " fair trade " laws result in an unlawful delegation of legislative power (*e.g.*, *Schwegmann* v. *Eli Lilly & Co.* 205 F. 788 (1953)); (b) that they violate provisions against monopoly and price fixing in the constitutions of some states and (c) that they infringe the 14th amendment which protects citizens from being deprived of their proprietary rights without due process of law. This has come to mean "arbitrarily or without just cause ": the distributor cannot arbitrarily be deprived of his right to sell his own goods at the price he chooses. The just cause is found by some in the proprietary right of the person whose name, brand or trademark is affixed to the goods to maintain its reputation and goodwill. This may be lowered if the commodity can be bought too cheaply (see *infra*, note 33). In fact, however, it is often the distributors who have forced resale price maintenance on the manufacturer. It was largely the retail druggists who fought for the " fair trade " laws (E. S. Herman (1959) 27 Geo.Wash.L.Rev. 621 at 626 *et seq.* describes the devious means used by NARD to obtain the passage of state and federal legislation. See also " A Symposium on the ' Fair Trade ' Laws " (1958) 27 Fordham L.Rev. 68 at p. 89, note 49; B. S. Yamey, *The Economics of Resale Price Maintenance*, 1954, Pitman, Chap. VII.) However, the courts usually continue to speak as if it is the protection of the supplier's goodwill that is in issue, though not invariably (27 Fordham L.Rev., p. 90, note 52; *Schwegmann* v. *Eli Lilly*, *supra*).

[19] *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.* 299 U.S. 183 (1936), Schwarz, p. 554.

did not mention non-signers and in *Schwegmann Bros.* v. *Calvert Distillers Corp*,[20] the Supreme Court held that it did not bind them by implication. As a result the controversy between the proponents and opponents of "fair trade" flared up again. Both the F.T.C. and the Department of Justice, the two bodies who enforce the anti-trust laws,[21] continued to oppose "fair trade" strenuously. However, Congress, while not deciding the controversy, thought the matter should be left to the legislatures of the various states and the McGuire amendment containing a non-signer clause passed both houses in 1952 and despite the vigorous dissent of Judge Holmes, was upheld by the Court of Appeals in *Schwegmann Bros.* v. *Eli Lilly & Co.*[22]

Like the Miller-Tydings amendment, it applies only to vertical agreements [23] relating to commodities bearing the trademark, brand or name of the producer or distributor and which are "in free and open competition" with commodities of the same general class produced or distributed by others,[24] when such contracts are lawful as applied to intra-state transactions under the law of the state in which the resale is made, or in which the commodity is to be transported for such resale.

Many problems remain to be solved. With what goods must the commodity be in competition? [25] Where is the contract of resale made? Where the goods are when title passes. Does this mean that a mail order company with a warehouse in a free trade state can advertise and offer goods for sale below the maintained price in a "fair trade" state, if it arranges for title to pass when the goods are in the free trade state? [25a] Under many "fair trade" laws price-cutters may be sued by competing distributors

[20] 341 U.S. 384 (1951); Schwarz, p. 587.

[21] But not the "fair trade" provisions, although they are a defence to proceedings under the Sherman or Federal Trade Commission Acts.

[22] 205 F. 2d. 788 (1953).

[23] All "fair trade" legislation is similarly limited which prevents an integrated manufacturer *cum* trader from imposing resale prices in his manufacturing capacity as it would amount to a horizontal agreement or combination between traders: *U.S.* v. *McKesson and Robbins Inc.* 351 U.S. 305 (1956), Oppenheim, p. 212. Though some earlier state and F.T.C. cases went the other way: *Eastman Kodak Co.* v. *Aljan Camera Co.* (1954) (N.Y. Sup. Ct.), *Re Eastman Kodak Co.* F.T.C. Dkt. No. 6040 (1955), CCH Tr. Reg. Rep. ¶ 25,291, Oppenheim p. 215. There is no such prohibition in this country.

[24] But one other manufacturer is enough (*Eastman Kodak Co.* v. *F.T.C.* 44 F.T.C. 14, 16 (1947)) even if they meet each other's prices (*Eastman Kodak Co.* v. *Home Utilities Co.*, 138 F.Supp. 670, 674, appeal dismissed 352 U.S. 956 (1957)). This is so even if entry into the market is made difficult by the existence of patents etc. See Herman's article (cited *supra*, note 18) at pp. 647–651.

[25] See *Eastman Kodak Co.* v. *F.T.C.* 158 F. 2d. 592 (1946), Oppenheim, p. 211. The decisions on this subject are not usually very explicit or mutually consistent, but apart from this case, they have tended to define the classes broadly: Herman, 27 Geo.Wash.L.Rev. 621 at 650.

[25a] The facts in *General Electric Co.* v. *Masters Mail Order Co.* 244 F. 2d. 681 (1957); Oppenheim, p. 217) were less extreme, but it was held that no action lay. This led to attempts, so far unsuccessful, to obtain amending legislation. Meanwhile some manufacturers have abandoned "fair trade" for many of their smaller products: (1957) 27 Fordham L.Rev. 68, at pp. 107–111.

who have suffered damage.[26] This encourages artificial avoidance tactics when resale prices are not uniformly fixed or enforced. A manufacturer will be unable to come to equity for an injunction with " clean hands " unless he has been fixing and enforcing the resale price fairly and diligently. However, unless lack of enforcement amounts to abandonment of resale price maintenance, this will be no defence to an action by a competing distributor, even if the discriminating manufacturer induced him to sue.[27]

Some states have also passed Unfair Sales Acts, prohibiting sales below cost. But the administrative and legal difficulties they involve have been considerable.[28]

The present position [29] seems to be that a large manufacturer can impose resale prices either by distributing goods entirely through his own organisation, or by making the independent distributors his agents, with all that involves.[30] The small " fair trading " manufacturer, to whom such methods are not available unless he is prepared to refuse to sell to price-cutters,[31] remains at the mercy of the mail order or other firm in a free trade state over the border, especially now that fewer states have valid " non-signer " clauses.

The Attorney-General's National Committee to Study the Anti-trust Laws considered " fair trade " in 1955. It acknowledged that

> " Fair trade " enactments reflect some legitimate commercial aims. Nationally advertised and branded consumer commodities readily lend themselves to loss-leader and cut-rate merchandising that can impair substantial investments in business goodwill " (p. 153).

However, " fair trade " pricing was thought to go far beyond the protection required—it strikes not only against promotional price reductions, but also at those which might pass on to the consumer the economies of competitive distribution. Further, vertical resale price maintenance is often more effective than horizontal in eliminating price competition. The Committee therefore recommended the repeal of both the Miller-Tydings and McGuire amendments, though some members felt that Congress should consider means of

[26] *Ibid.* at pp. 85–86. Though the cost and delays of litigation may prevent many from doing so, this represents a considerable difference from the U.K. legislation.

[27] *Ibid.* at p. 90, note 55, and text thereto: *Burstein* v. *Charline's Cut Rate* 126 N.J.Eq. 560 (1940); 10 A. 2d. 646.

[28] Neale, *op. cit.* (*ante*, note 13) at pp. 361–363. For instance what overheads should be included in the cost?

[29] The issues for the legislature are discussed by McLachlan, " A New Approach to Resale Price Maintenance " (1958) 11 V.and L.R. 145 at p. 147.

[30] *e.g.*, retaining title until the goods are sold and being responsible for their accidental loss. The detailed working of the scheme is described by Chief Justice Taft in *U.S.* v. *General Electric Co.* 272 U.S. 476 (1926). Schwarz 529; Oppenheim, p. 202.

[31] See *ante*, note 16. He must tread warily to avoid the *Beech-Nut* principle and may have to reduce capacity (Herman, 27 Geo.Wash.L.Rev. 621 at 632 *et seq.*).

dealing with the problems of loss-leader sales and the debasement of widely advertised trade marks and business goodwill.[32]

The Canadian experience raises a query as to how serious loss-leader selling would be if resale price maintenance were abolished.[33] The Combines Investigation Act, 1952, s. 34, passed pursuant to the recommendations of the MacQuarrie Committee,[34] made resale price maintenance illegal [35] at the time the McGuire amendment was being passed on the states. The Canadian legislation was passed in the face of great controversy, and fears were expressed that small merchants would suffer drastically as a result. The MacQuarrie Committee recommended that the problem of loss-leader selling should be carefully reviewed, and in 1955, three years after the change in the law, the Restrictive Trade Practices Commission reported.[36] After careful study, it concluded that the occurrence of instances of serious loss-leadering had been sporadic and exceptional and not sufficient to warrant new legislation for suppression or control. The Commission thought that the basis of most complaints about loss-leader selling was the operation of normal competitive forces, distributors selling below list prices profitably, on the basis of smaller margins and larger turnover.[37]

32 A few members dissented from the recommendations on the ground that resale price maintenance, by eliminating certain undesirable practices such as loss-leader selling, allowed the small dealer to stay in business (pp. 154–155).

33 P. W. S. Andrews and F. A. Friday, *Fair Trade: Resale Price Maintenance Re-examined* (1960) pp. 27–29, give some recent examples from the U.S. of price-cutting leading to an over-all loss of sales for leading brands. E. S. Herman (1959) Geo.Wash.L.Rev. 621 at 632 suggests that there are no authenticated cases of manufacturer failure due to price-cutting. Yamey, *The Economics of Resale Price Maintenance*, says at p. 98: "It must not be supposed that selective price-cutting is never practised in order to create a favourable impression. But it would be incorrect to regard loss-leader selling as the crux of the price maintenance problem." In the absence of resale price maintenance, loss-leader selling may be less effective in enticing customers and therefore less commonly practised.

34 Interim Report of the Committee to Study the Combines Legislation (1952). Generally on the Canadian position see Blair, "Combines, Controls or Competition?" (1953) 31 Can.Bar Rev. 1083 and the article in Friedmann (Ed.), *Anti-Trust Laws* (1956) at pp. 28–32.

35 *i.e.*, criminal. This may lead to difficulties in reconciling the manufacturer's right to refuse to deal with a particular trader and a refusal arising from a determination to enforce resale prices. Such problems do not arise under s. 24 of the U.K. statute, which forbids only agreements, arrangements and so forth to stop supplies and not the actual stoppage. The Canadian position is also stricter than the U.S. which prohibits only agreements, combinations and conspiracies to enforce resale prices, but not individual refusals to deal. See *ante*, note 16.

36 Report on an Inquiry into Loss-Leader Selling, 1955. Reviewed by Cohen (1955) 33 Can.Bar Rev., p. 1198.

37 No selling below cost was proved: see Cohen (*op cit.*, supra, note 36) at p. 1202. This finding raises an ethical economic problem: against what competition should the small trader be protected, only against the unfair use of power by large traders, or also against their superior efficiency, especially that derived from economies of scale?

The English Statute: "Price at which those Goods may be Resold"

To return to section 25, only "a condition as to the price at which those goods may be resold" can be enforced against non-signers. Various avoidance devices may be based on transactions artificially entered into either so as to prevent their being sales, but, for instance, gifts, barter, or even hire (but not hire purchase), or where, although the list price is charged, other valuable goods or services are given free, or below cost.

"Resale" is not defined in the Act, except that under section 26 (3) it includes hire purchase, but one of the definitions in the Sale of Goods Act that the draftsman thought was purely declaratory of the common law [38] is

> "1—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."

"Price" is not defined, either, except that under section 36 (1) it includes a charge of any description and, under section 26, section 25 is made to apply to a condition as to the amount of discount which may be allowed on the resale of any goods or as to the price which may be paid on the resale of any goods for other goods taken by way of part exchange.[39] The word does not appear to be a term of art. Its extent may be considered in relation to various forms of concealed price-cutting, many of them known before the Act was passed. For instance, under the net-book agreement, it was a breach of price maintenance arrangements if a bookseller "offers or gives any consideration in kind, *e.g.*, card-indexing, stamping, reinforced bindings etc., at less than the actual cost thereof to the bookseller." [40] These services can hardly be called discounts, so an aggressive trader by providing any of them free or at uneconomic rates to his customers may gain a competitive advantage.

"Discount" is not defined, but in the Oxford dictionary appears as

> "2 *Commerce* (a) A deduction (usually at a certain rate per cent.) made for payment before it is due, or for prompt

[38] Chalmers, *Sale of Goods*, 10th ed., p. 2. This was the latest edition prepared by the author. Only one case has been decided on the meaning of resale under s. 25: *Beecham Foods, Ltd.* v. *North Supplies (Edmonton) Ltd.* (1959) L.R. 1 R.P. 262; noted (1960) 23 M.L.R. 88. Vaisey J. held that the bottle in which liquid "Lucozade" was sold was itself hired and so outside the section.

[39] The last provision was probably not necessary, inasmuch as at common law, though sale must be for a monetary price, it may be also in consideration of other goods valued in money and the whole consideration forms the price: 29 Halsbury, *Laws of England*, 2nd ed., p. 6; Chalmers, *op. cit.*, 13th ed., by Sieghart, pp. 7–8.

[40] Text of the net-book agreement in B. N. Langdon-Davies, *The Practice of Bookselling* (1951) p. 178. The agreement which is mentioned in the collective discrimination report has since been modified.

> payment of a bill or account; . . . any deduction or abatement from the nominal value of price,"

and the verb to discount is defined as

> " to reckon as an abatement or deduction from a sum due or to be accounted for."

The statute is not dealing with any particular trade, so no trade usage can rebut the primary meaning of the word, nor do economists use it differently. However, since the normal meaning may lead to widespread avoidance of section 25, it may be that a strong court might treat the giving of money's worth as equivalent to a deduction from a sum due.[41]

It seems surprising that although two post-war bodies had reported on resale price maintenance,[42] examples of concealed price-cutting mentioned in the reports were not provided for. After-sales service is particularly important for the sale of consumer durables, such as cars and refrigerators, but could hardly be called a discount; nor could carriage.[43] Gift coupons and trading stamps may give rise to difficulties, which will be considered by means of hypothetical examples of a trader who wishes to reduce his prices, without becoming liable under section 25.

If he gives a gift to everyone entering his shop, whether they purchase anything or not, this would not infringe the section.[44] Similarly, if he gives an article, price-maintained or not, to every customer at Christmas, this is presumably a gift and outside the section: it is not a discount, for no deduction is made from money owed, nor is there any proportion between the value given and the amount of the custom, nor is it sale, for there is no price. But if two price-maintained articles are given for the price of one, it is submitted that there is a discount, for although it might be analysed as a gift of the second object, it is commercially more apt to consider it as a 50 per cent. discount from the price of each.[45]

41 In *Kruhlak* v. *Kruhlak* [1958] 2 Q.B. 32 a wife was allowed to issue a complaint as " a single woman " against her husband, where justice required a departure from the literal interpretation.

42 Lloyd Jacob Report (*ante*, note 7), para. 124 *et seq.*; collective discrimination report (*ante*, note 10) para. 127 *et seq.*

43 Some of the U.S. " fair trade " laws forbid only price-cutting, discounts not being expressly mentioned, but Spalding J. in *Colgate-Palmolive Co.* v. *Elm Farm Foods Co.* 148 N.E. 861 at 865 (1958), decided that a cash discount was a form of price-cutting, a decision that does not stand alone. Nevertheless, the U.S. cases make it clear that many store promotional services do not amount to price-cutting, *e.g.*, providing parking space, rocking-horses and assistants to look after children. It has been held that the giving of credit on instalment sales does not amount to price-cutting, even if losses may be expected to total as much as 20 per cent. of the gross sales (*Sunbeam Corp.* v. *Klein* (Del. Ch.) 79 A. 2d. 603 (1951)).

44 In *Bernhard* v. *Savall Drug Store, Inc.* (N.Y.Sup. Ct.) 82 N.Y.S. 2d. 122 (1948); (1958) 27 Fordham L.Rev. 68 at p. 100. The U.S. cases are helpful in this field, although " discounts " are not *expressly* mentioned in their " fair trade " laws and not all courts have treated them as price-cuts.

45 *Frank Fischer Merchandising Corp.* v. *Ritz Drug Co.* (N.J. Ch.) 19 A. 2d. 454 (1941), where the sale of such a combination by the manufacturer was held

If the trader gives a price-maintained object for every pound spent, it is not a sale if there is no price. But it might be argued that the purchases and the " free gift " are together sold for £1, so that there is a discount from the amount owed on the combined sale.[46] The same argument applies if a non-price-maintained object is given with sales of price-maintained goods,[47] the only difference being that if a nominal price were charged for the non-price-maintained article, it might be argued that the discount came from it, though it is again submitted that the transaction should be analysed as a combined sale where the non-price-maintained article could not be bought so cheaply on its own.

This analysis holds if gift tokens, trading stamps, or cash register receipts redeemable in merchandise are given: they would not be within the section, unless given in relation to purchases of price-maintained goods: but if they are, then the benefit of the stamps, etc., should be treated as part of the transaction in which the price-maintained goods were bought, as part of the combined sale, so that unless the price was increased to cover the value of the stamps, an action could be brought under section 25.[48] How far the price need be increased is arguable where the merchandise obtainable with the stamps is not price-maintained. The stamps may not be redeemable until purchases of substantial value have been made, so it might not be necessary to charge the usual retail

to be evidence that he had abandoned resale price maintenance of those products, and so was the sale of packets containing two price-maintained goods for the price of one, plus 1 cent.

[46] In *Du Pont* v. *Kaufman & Chernick* 148 N.E. 2d. 634 (1958); [1958] *Annual Survey of American Law*, p. 190. (Mass.) the gift of a gallon of Zerex fair-trade with the purchase of each tyre (price free) was held to be a combined sale and so the price of Zerex was cut, although it purported to be a gift, not a sale.

[47] *Squibb & Sons* v. *Charlines Cut Rate Inc.* (Sup. Ct. N.J.) 74 A. 2d. 354 (1950). A Dunhill lighter was given away with the purchase of " fair traded " drugs of $2 or over. It was held that this was a reduction in price: it was among the evils the Act was passed to prevent. I have taken cases mainly from N.Y. and N.J. because in most of the other states the " fair trade " law itself provides whether gifts may be given. See (1958) 27 Fordham Law Rev. 68 at p. 100.

[48] The U.S. decisions on this are not uniform, as in some states it is said that the stamps amount to a discount for paying cash and not to price-cutting. See (1959) 34 N.Y.U.L.R. 304, 307–309; (1958) 27 Fordham L.Rev. 68 at pp. 102–103. Such an argument would clearly not be relevant to our statute. Practical problems arise if such stamps cannot be given, the " deferred discount " may be less than ½d. and to add this to the price of the goods might prevent their sale, while to exclude such purchases from the " divi." may be administratively expensive, especially as regards credit sales. It is doubtful whether trading stamps come within the evils resale price maintenance is said to prevent. (See Lloyd Jacob Report, paras. 96–103, and *Colgate-Palmolive* v. *Elm Farm Foods Co.*, *supra*, not 43, for some of the arguments also *Bristol Myers* v. *Lit Bros.* (Pa.) 6 A. 2d. 843 (1939), Schwarz, p. 564 and following notes. When it was held in the former case that giving stamps did amount to price-cutting, a new " fair trade " agreement was negotiated allowing it: (1959) 34 N.Y.U.L.R. 309. However, if used widely, the cost of the stamps may be added to the price of the goods, increasing the cost of living, and some states have prohibited or taxed them: (1959) 12 P. of Fla. Law Rev. 213, 218 *et seq.*

price for goods that will be obtainable only in the future and if sufficient purchases are made.

But if I am wrong, and "free gifts" or trading stamps, as opposed to cash, do not amount to a discount, not being an abatement from money owed, and the combined sale analysis is rejected, then if cash is not obtainable from the trader, there would be no sale and no price, or discount. If a car dealer were to give shares quoted on the Stock Exchange with every car sold,[49] money could easily be obtained by the customer, but not directly from the trader, so it is hardly an abatement from the price of the car, for it is not the creditor who releases part of his debt. If, instead, the car dealer gives with each car a token entitling the customer to some object, but is himself prepared to buy his own tokens, it is submitted that this should be considered a discount, for he is, in effect, giving the customer a choice of the gift or of the price he is prepared to pay for it, the latter being a deduction from a sum due.[50] But how distinct need the person selling the goods be from the person buying the tokens? [51] Would the court lift the veil of incorporation if a trader formed a company of which he was the main shareholder and chairman, and, as agent for the company, was prepared to buy the tokens, informing his customers of this before they made their purchase? If not, and if the arguments as to combined sales are not accepted, then the way to avoidance on a large scale seems to be open, though it might be reduced by manufacturers maintaining differential minimum prices.[52]

Are these possibilities of avoiding section 25 undesirable? If they are, then a strong court might be prepared to define discount widely,[53] or to analyse transactions into combined sales, rather than sale plus gift. The question is controversial. Economists in general seem to have little to say in favour of resale price maintenance and a great deal against,[54] though the bodies that

49 In the case of most consumer durables, this could be prevented by the owner of patents involved in their manufacture, as restrictions unlimited in this respect can be imposed by the patentee. See T. A. Blanco White, "Price Maintenance in English Law" [1959] J.B.L., 241 at 243. In *Dunlop* v. *Longlife Battery Depot*, L.R. 1 R.P. 65, the claim under section 25 failed, but that under the Patent Acts succeeded.

50 It is submitted that even if the dealer insists on the full list price being paid and only afterwards buys back the token, this should be treated as part of the same transaction, so as to amount to a deduction from a sum due.

51 The definitions in the Act do not help as they apply to references in the Act, while we are considering the dictionary meaning of discount.

52 *e.g.*, 2s. 6d. for retailers giving no goods or services at less than 10 per cent. above cost and 3s. for those who do. Agreements between manufacturers or wholesalers to do so, though registrable, would not infringe s. 24 (1) (b) as traders giving such benefits to their customers would not be trading in circumstances similar to those not doing so. Such differentials could also affect services that are clearly not within s. 25.

53 If it restrains freedom of trade, it ought to be construed narrowly, see *ante*, p. 219. The next suggestion might accord with the commercial common sense recommended by Romer L.J.

54 J. D. Kuipers, *Resale Price Maintenance in G.B.*, Chaps. 3 and 4. A good little book is B. S. Yamey, *The Economics of Resale Price Maintenance* (1954), Pitman. More recent pamphlets are *Resale Price Maintenance and*

considered the matter before 1956 were less disapproving. The Lloyd Jacob Report, while generally unfavourable to resale price maintenance, recommended that no action should be taken which would deprive an individual producer of the power to prescribe and enforce resale prices for goods bearing his brand [55]; but they qualified this so as to allow deferred discounts or " divis " to be given.[56] They also believed that self-service shops with lower distributive costs should be allowed to charge a lower price.[57] However, section 25 is not confined to branded goods, nor to producers, and it does apply to deferred discounts and self-service shops. In their Collective Discrimination Report, the Monopolies and Restrictive Practices Commission recommended against collective enforcement,[58] the only aspect of the question within their terms of reference.[59] However, in its Report on the Supply of Electric Lamps,[60] it did recommend that a minimum price-fixing scheme between manufacturers, coupled with minimum price maintenance at the various levels of distribution might be allowed to continue, subject to important safeguards as to the level at which prices should be maintained, as the practice encouraged the exchange of patents and technical information. So while neither body seemed in favour of the practice as a whole, neither was prepared to condemn it entirely. Since the Act came into force, the (Cohen) Council on Prices, Productivity and Incomes has suggested a reconsideration of section 25.[61] This may be doubly important as, in its Report on the Supply of Tea,[62] the Monopolies Commission appears to think that as a result of section 25, there is a presumption that the individual enforcement of resale price maintenance is generally not against the public interest.

Enforcement

No obligation is imposed on the supplier to enforce his prices fairly as between different traders, so the various methods of avoiding the

Shoppers' Choice by the same author (1960) and an answer to it by P. W. S. Andrews and F. A. Friday, *Fair Trade Resale Price Maintenance Re-examined* (1960).

55 *Ante*, note 7 (Mr. H. Smith dissenting), para. 163. Producers are widely defined.

56 Paras. 96–103, and 164.

57 Paras. 104–109, and 164. Some provisions were made to prevent selective price-cutting or loss leader selling.

58 *Ante*, note 10, para. 175. But four members, including Professor Goodhart, thought that collective enforcement of individually fixed prices should be allowed, subject to restrictions which would facilitate the investigation of individual cases: paras. 254–269.

59 Mr. Henry Smith again criticised resale price maintenance generally (34–35) and thought that its evils outweighed those of even the most reckless price competition by distributors.

60 1951. Paras. 258 and 262–264.

61 A suggestion taken up by B. S. Yamey in [1958] *Public Law*, p. 358.

62 1956. Para. 171. Since there were no special circumstances in this industry, individual resale price maintenance was found not to be contrary to the public interest. Yamey, *op. cit.*, *supra*, note 61, at p. 366, note 19.

provisions of section 25 may be very important and possibly even desirable. In this age of chains of supermarkets and multiple shops, a few buyers can wield considerable economic power. If a manufacturer imposes a price of 2s. 6d. for an article, what is the small retailer to do if he finds a powerful distributor retailing it at 2s. 4d.? As his goodwill may disappear fast, he may be tempted to reduce his price to the same level. Would he then have any defence to an application for an injunction, if he were sued by the manufacturer?

If the cases decided before the Act are followed in proceedings brought against non-signers under section 25, then he would not, for they went far in enforcing conditions contractually accepted. In *Palmolive Co. (of England) Ltd.* v. *Freedman* [63] a retailer sold soap below the 6d. agreed only after *many* shops in the neighbourhood were doing so, but this was held to be no ground for refusing an injunction. In the U.S. the courts have said that the manufacturer coming to equity for an injunction must come " with clean hands," or must " do equity," so they refuse relief unless the manufacturer has fixed and enforced resale prices fairly and diligently. He need not charge the same price throughout the country, but different prices in the same market would be discriminatory; nor need he sue every price-cutter, provided he does not discriminate improperly, but he may be required to bring one or two actions or stop supplies to price-cutters.[64] The limits of these rules are necessarily imprecise, but they appear to prevent flagrant discrimination in enforcement. However, in that country, competing distributors have an independent right of action, which enables manufacturers who discriminate to enforce resale prices indirectly.[65]

In this country only the supplier imposing the resale price condition can obtain relief, so such enforcement tactics are impossible, and there seems to be little reason for not making use of the " clean hands " maxim, especially in favour of non-signers. However, this would not apply to an action for damages at common law.[66] In the U.S. such relief has proved almost worthless, because

[63] [1927] 2 Ch. 333.

[64] See *Hutzler Bros. Co.* v. *Remington Putnam Book Co.* 46 A. 2d. 101 (1946), Schwarz, p. 577, also Brecher, " Buying at a Discount," 14 *Consumer's Union Reports* 420 (1949), an excerpt of which is reproduced in Schwarz, at p. 574. *Calvert Distillers Corp.* v. *Nussbaum Liquor Store* (1938) (Sup. Ct. N.Y.).

[65] See *ante*, pp.223–234.

[66] In *Livock* v. *Pearson* (1928) 33 Com.Cas. 188, after a manufacturer had been supplying a retailer for three years with goods, subject to a condition as to the price at which he might retail them, the manufacturer began to retail them himself at a lower price. Yet Branson J. refused to imply a term that would prevent the manufacturer from doing so without giving sufficient notice to the retailer to enable him to dispose of his stock, before the competition forced him to sell wholesale at a loss to someone who would not be bound by the condition.

Professor B. S. Yamey ([1958] *Public Law*, 358 at 363) queries whether

of the difficulty of proving and quantifying damage, but it will be submitted later that in this country such difficulties may be overcome.

What then should traders do to protect themselves from actions for damages and perhaps injunctions if they are faced with discriminatory enforcement? It is unlawful for two or more dealers to agree or arrange to withhold orders for supplies of goods from suppliers who supply or have supplied goods to other dealers otherwise than subject to a condition as to the price at which they may be resold, or who refrain from taking steps to ensure their compliance with such conditions in respect of goods supplied by them.[67] Traders fearing discrimination could amalgamate to form a powerful buying unit, but many value their independence and to avoid the section the amalgamation would have to be substantial.[68]

It is suggested that it would be legal for traders to agree to buy through a common association, whose bargaining power might then become commensurate with the centralised buying department of a multiple trader.[69] To avoid the provisions of section 24 (2) they would agree to buy from this association, rather than to withhold orders from those discriminating in the enforcement of resale prices, but there would be nothing to prevent the association from actually withholding orders from such suppliers, for there would be

an injunction would have been granted against the retailer if he had cut his prices in such circumstances.

In the U.S. it would not, as such conduct would be evidence of abandonment of the condition, at any rate against non-signers (*Frank Fischer Merchandising Corp.* v. *Ritz Drug Co.* (Ch.) 19 A. 2d. 454 (1941), third claim). See also (1958) 27 Fordham L.Rev. 68 at p. 92.

In this country it is submitted that while an injunction might be refused, despite *Palmolive* v. *Freedman*, an action for damages would lie. It is also submitted that the result would be the same if the manufacturer was proved to have allowed favoured retailers to sell at less than the maintained price.

The retailer's position would be worse after 1956 as other retailers who acquired the goods with notice of the condition would be bound by it, and so he might be unable to dispose of the stock.

67 s. 24 (2). Under (3) agreements include recommendations.

68 Under s. 26 (2) and s. 36 (1) they would have to become either partners or inter-connected bodies corporate within s. 154 of the Companies Act, 1948. However most partnerships are limited to twenty members—*ibid.*, s. 434. To be a subsidiary of another company within s. 154 that other must be a member of the subsidiary company and be able either to appoint or remove a majority of the board of directors, or own more than half in nominal value of its equity share capital. Control may however be left with the directors of the subsidiary company, *i.e.*, each trader, under the second alternative by means of shares weighted as regards votes, or by attaching votes to non-participating preference shares. See L. C. B. Gower, *Modern Company Law* (2nd ed., 1957), pp. 189–191.

69 At the moment there is little resale price maintenance in the grocery trade, and independent grocers who were weakened by the advent of multiple supermarkets have joined hands with wholesalers, whose trade with them was threatened, to form "voluntary chains" and while keeping the advantages of independence have secured many of the benefits of the larger unit. But this co-operation did not have to avoid the problems of wholesale price maintenance. See "Fair Trade" *ante*, note 33, at p. 65.

no agreement.[70] Yet the establishment of such an association is not without difficulties, if breaches of section 25 are to be avoided. Presumably it would buy wholesale at the largest quantity discounts obtainable, and the small trader would wish to obtain part of its net profits in return for his loyalty in buying from it. If a company is formed in which each of many traders holds one share, it would be easy to pass on part of the discount to traders where wholesale prices are not maintained and of course it could supply amenities for all members with the profits derived from goods whose wholesale price is maintained. But this might be unfair to members buying a higher proportion of such goods. How can part of the discount on them be passed on to the firms actually supplied without infringing section 25?

It is submitted that each retailing firm, being a member of the company, might nominate one person to be broker to the company, to be remunerated [71] by it for each customer he introduces, by a percentage on all business done with such a customer. It would then be a matter between the nominated broker and the nominating member of the association, whether he had to account for such remuneration. The proportion to be passed on to retailers and/or brokers could be reviewed periodically. The only doubt entertained by the writer is whether the court would hold the remuneration of the brokers to be a disguised discount, contrary to section 26, paid to the nominating firm.[72]

The difficulty of the discriminating supplier may be superable, but what of the converse case of the aggressive cut-price retailer? Under section 25 he may be sued as if a party to a contract, and in particular an injunction may be granted. Probably this will be the main sanction, carrying as it does the threat of indefinite imprisonment for contempt of court. But it is submitted that orders may have to be more widely worded.[73] The type of trader being considered might place orders with many suppliers, and under-sell until injunctions had been awarded to all, then close that shop and repeat the process with other suppliers, using other

70 Provided the managers of the association did not consist of two or more persons as defined in s. 26 (2). See *supra*, note 68.

71 This would be better than differential dividends for tax purposes: it would be a deductible expense for the company for profits tax and subject to earned income relief in the hands of the broker, unless he had to account for it.

72 The sympathy of the court which might be gained if the position of the small trader, against whom the suppliers were discriminating, were mentioned, would not avail against a common law action for damages, but might persuade the court to analyse the situation superficially.

73 In *Dunlop* v. *Longlife Battery Depot*, L.R. 1 R.P. 65, the defendants were restrained from infringing the plaintiffs' patents "by themselves or by their servants, agents or workpeople or otherwise howsoever." Would "howsoever" include the defendant's acts through his employer or principal? It might be as well to restrain him also from inciting or encouraging other persons whomsoever to infringe s. 25.

companies [74] and business names. To prevent this, injunctions should be worded as widely as can be devised, consistently with the requirement of certainty.[75]

It is illegal [76] for manufacturers to agree to stop the supplies of such price-cutters, though individual suppliers are at liberty to cease supplies provided no enforceable contract is broken. However, it might be legal for a trade association to prepare and circulate lists of traders known to have infringed resale price maintenance conditions, provided that the law of defamation is considered,[77] and provided that the withholding of supplies or the imposition of penalties is not recommended. The danger is that a tacit agreement or recommendation might be inferred from the circulation of the list, especially if members were encouraged to report price-cutters.[78]

One difficulty in trades with a large number of retailers is that it may not be easy to detect an alias. Not only may statutory returns to the Registrar of Companies be delayed, but the aggressive trader need not be a statutory officer and his shares could be held through a nominee, in which case his name would not appear on the file. The Registration of Business Names Act, 1916, is little more effective against the large trader, for the penalty for not sending particulars may be as little as £5 per day and the main sanction of the Act is that contracts may not be enforced by persons in default.[79]

However, it may be argued that these attempts to prevent infringements are unnecessary, as where they are substantial an action for damages will lie. This may be true theoretically, but the assets of a business may have been dissipated, so that it is not worth the expense of taking proceedings, and even if there are sufficient assets it may be almost impossible to prove the number

74 One can be formed for under £25.

75 In *Mann* v. *Stephens*, 15 Sim. 377, an injunction had been granted forbidding the defendant from erecting any building other than "one private house or ornamental cottage to be erected in the Dell, *and which shall be an ornament rather than otherwise to the surrounding property.*" Lord Cottenham varied this order by cutting out the words in italics as being too indefinite.

76 s. 24 (1), but not criminal, s. 24 (6).

77 It was held not to be defamatory to place a retailer's name on a stop list—*Ware and de Freville* v. *M.T.A.*, *ante*, note 8. However, before 1956 this did not mean that he had broken a condition legally binding on him; now, it would. Unless such breach could be proved to the satisfaction of a jury, there would be no defence if the statement is capable of being defamatory: qualified privilege would not help if persons with no interest in the communication had seen it: *White* v. *Stone* [1939] 2 K.B. 827.

78 This was an important ground for the *Beech-Nut* decision, *ante*, note 16; although there the tacit agreement was vertical, not horizontal, similar arguments apply.

79 ss. 7 and 8. It might prevent him from claiming delivery of goods already ordered, but once discovered he might close the shop and flit before an injunction was obtained against him, as that would make him liable to imprisonment if he were later found price-cutting.

of infringements committed.[80] If this hurdle is surmounted, what will be the measure of damages? The supplier may temporarily have sold more goods, owing to the activities of the price-cutter, though indirectly he may have suffered loss of goodwill: his other customers may not continue to stock goods that cannot be easily sold.[81] Unless they are prepared to co-operate, such loss is hard to quantify,[82] as it would not be sufficient to prove that orders from some customers for some items had ceased.

Before 1956 these difficulties of proving damage were by-passed by the use of lump sum clauses—the distributor to pay, say £15, for every breach of the condition as to price, whether it were cut by 1d. or £10. Such clauses were upheld by the courts despite their apparent arbitrariness [83] just because damages were so difficult to assess. In *Imperial Tobacco Co.* v. *Parslay* [84] the defendant entered into a contract with the plaintiffs whereby he promised to pay £15 for every breach of his agreement not to sell below the plaintiff's list prices. He was sued for eleven infringements, each for selling at 11d. instead of in some cases 1s. and in others 11½d. Goddard J., as he then was, held that this was a penalty clause and not a fair pre-estimate of the probable damage as £15 was out of all proportion to an item priced at 1s. or less. However, his decision was reversed by the Court of Appeal on the ground that the reasonable proportion the agreed sum must bear to be valid, was not with the price of the item sold, but with the probable consequences of the price-cutting. Lord Wright M.R. quoted from Lord Dunedin in *Dunlop* v. *New Garage*,[85] "it is no obstacle to the sum stipulated being a genuine pre-estimate of damages, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties." He also pointed out that the unequal bargaining position of the parties was irrelevant, though, of course, it is important in restraint of trade issues. In

80 Actions are usually based on trap orders. Price-cutting even for consumer durables can be concealed in the accounts (Brooker, "Some Limitations of the Use of Traders' Books in Evidence" (1959) 26 *The Solicitor*, p. 67). For small items no concealment would be necessary as the only entry would be the contents of the till at the end of the day and it would not be possible to show that the price of any particular class of goods was cut.

81 See "Fair Trade," *ante*, note 33, at pp. 27–29, for examples of leading manufacturers suffering considerable losses as a result of loss leadering."

82 In *Elliman, Sons & Co.* v. *Carrington and Son Ltd.* [1901] 2 Ch. 275, only nominal damages were awarded, although in theory substantial damages may be claimed. In *B.M.T.A.* v. *Salvadori* [1949] Ch. 556 at p. 570, Roxburgh J. directed an inquiry into damages, after referring, *inter alia*, to Lord Dunedin's judgment in *Dunlop* v. *New Garage*, *infra*.

In the U.S., injunctions are considered to be the only practical means of relief—*Calvert Distillers Corp.* v. *Stockman* 26 F. Supp. 73 (E.D.N.Y. 1939); (1958) 27 Fordham L. Rev. 68 at p. 92.

83 Which would be prima facie evidence that they were penalties imposed *in terrorem*, contrary to public policy and so void.

84 [1936] 2 All E.R. 515; 52 T.L.R. 585.

85 [1915] A.C. 79 at pp. 87–88. This was also a resale price maintenance case.

the result, damages of £165 were awarded, being £15 of each of the eleven infringements proved.

Since the covenant was held to be valid, presumably £15 would have been awarded for each infringement, even if 10,000 had been proved. Would it then be possible to swell the damages by making trap orders not for eleven items, but for substantial quantities? It might be possible for the price-cutter to show that this intention existed at the time the condition as to the lump sum was attached to the goods, and he might argue that the manufacturer intended to induce known price-cutters to commit breaches so that large sums could be obtained from them, ruining them and deterring others; in other words that when the condition was attached to the goods, it was intended [86] to be used *in terrorem* and so was contrary to public policy and void. Where the lump sum is large, the courts are more likely to hold that the clause is a penalty. In *Ford Motor Co. (England) (Ltd.)* v. *Armstrong* [87] one reason for so holding was that the same sum of £250 was fixed for different types of breach, the other, that £250 was a large sum when multiplied by the number of infringements, some of which might be trifling. But a lump sum of even £15, when multiplied by a substantial number of infringements, might amount to tens of thousands of pounds. The courts have said that the problem is one of construing the contract,[88] and so in theory it is irrelevant what use one of the parties intends to make of the clause, as the courts must find the intention, in the objective sense, of both. However, in this field the contract is created by the unilateral act of selling the goods subject to the condition, which automatically binds those acquiring the goods for resale with notice of it,[89] so it may be arguable that the intention of the supplier when he sells the goods is the criterion.[90] It may often not be possible to prove substantial

[86] In practice such an intention would be hard to prove unless the supplier had adopted similar tactics before selling the goods in question.

[87] (1915) 31 T.L.R. 267 (C.A.).

[88] *e.g.*, Lord Dunedin in *Dunlop* v. *New Garage* [1915] A.C. 79 at pp. 86–87.

[89] Presumably "goods are sold by a supplier" under s. 25 at the date when the contract is made, rather than when title passes, and without the necessity of delivery (Sale of Goods Act, 1893 s. 1 (1); *Lockwood* v. *Levick* (1860) 8 C.B.(N.S.) 603 on the phrase "goods bought"), but they are presumably acquired by the sub-purchaser when he obtains title, often when the goods are appropriated to the contract. At the time of the contract, then, he may not be aware of the condition, and yet may be bound by it, even if the resale price is fixed so high that the goods are hard to sell. He is bound as if he were a party to a contract with the supplier, so must be taken to have contracted voluntarily. He should protect himself against this risk expressly in his contract with his immediate supplier, when goods are bought by description, as the supply of price maintained goods would not be a breach of the terms as to title or merchantable quality implied by the Sale of Goods Act, 1893. In *Sumner Permain & Co.* v. *Webb and Co.* [1922] 1 K.B. 55 (C.A.) it was held that though the tonic water could not be sold according to the local law of the country in which the vendor knew it was intended to be sold, it was still of "merchantable *quality*."

[90] Since the whole question is one of public policy, it might be argued that the form of fixing a comparatively small sum for breach, when the intention is to multiply it by inducing large-scale infringements might be ignored by the

infringements, except by trap orders,[91] which in a sense induce the breach. But it is submitted that whether or not large trap orders can be used to swell the damages, lump sum clauses are likely to be the only way of recovering substantial damages for proved infringements. It is also submitted that they can easily be drafted to form part of the " condition [92] as to the price at which those goods may be resold " and so run with the goods under section 25.

Other problems arise when the price maintained is not a minimum but a fixed or maximum one. If a housewife finds that a particular item she is in the habit of buying has become more expensive in the local shop, she may switch to a different brand, thinking that the manufacturer has raised the price or not bothering to shop elsewhere. Again it would be difficult to show how much goodwill was lost to the manufacturer. This difficulty is less likely to affect consumer durables where most purchasers take more trouble. However, maximum prices are sometimes fixed in times of shortage to hinder profiteering which the government might feel called upon to prevent by imposing restrictions. It is submitted that the manufacturer should not be allowed to recover the difference between the permitted maximum and the price actually obtained, as this is not the loss that he himself has suffered [93]: once he has parted with the goods by selling to a distributor, he cannot make a greater profit by selling above the maximum price, even if he is bound by neither the condition nor governmental regulation. But his actual loss may be greater; not only might widespread infringement lead to the loss of a free market if the government imposes regulations, but also its detection would require an increase in the expense of investigation.[94] But neither type of loss is easily attributable to any particular infringement, nor, if proved, would its pecuniary extent be easy to estimate. The type of loss, to be recoverable,

court. In *Alder* v. *Moore* [1961] 1 All E.R. 1 the majority of the Court of Appeal were prepared to look at the substance of the document including the alleged penalty, rather than to the form.

91 It might be possible to show that goods were displayed for sale at less than the list price, that on several occasions each day they had remained at that price together with the quantity of goods supplied to the price-cutter over the period.

92 On a literal reading, a " condition " would not include a warranty, though Wilberforce, Campbell and Ellis, *Restrictive Trade Practices and Monopolies* (1957), Sweet and Maxwell, § 924, suggest that it should. But to be safe, clauses should be expressly drafted as conditions, although, except in the case of instalment contracts, breach of the condition will probably occur only after the right to rescind has expired. Indeed it is difficult to see what should be rescinded in the case of infringements by non-signers.

93 See (1959) 37 Can.Bar Rev. 362 at 366 *et seq.*, for Mr. D. W. M. Waters' criticism of *Mouat* v. *Betts Motors Ltd.* [1959] A.C. 71 (P.C.). The cases decided on the covenants taken by car dealers and the Motor Trade Association after the war can be distinguished in that they were based on an option for the dealer to repurchase the car, and so were thought (perhaps wrongly—Waters *ibid.* and (1958) 36 Can.Bar Rev. 360 at 370) to involve s. 51 (3) of the Sale of Goods Act, 1893. Also under s. 25, breaches by the consuming or final customer would be irrelevant.

94 In *B.M.T.A.* v. *Salvadori* [1949] Ch. 556 where this was the loss alleged, the damage was not quantified, and an inquiry was directed.

must be foreseeable at the date of the fictitious contract with the supplier, presumably at the moment of acquisition with notice of the condition, or it will be too remote. To overcome these difficulties, it is again suggested that pre-estimates of probable loss [95] be drafted as " conditions as to the price at which those goods may be resold " so that they will run with the goods, as far at least as the retailer.

Conclusions

A great many problems arising from the construction of section 25 remain to be solved. The U.S. experience may be very helpful, not only in considering what amounts to price-cutting, but also in rejecting the earlier English cases that decided that a contracting party could be restrained from price-cutting, even when the resale price was not being fairly maintained.

It may also prove valuable in solving other problems, not adverted to in this paper: for instance, who can impose resale prices on combinations of goods supplied or manufactured by different persons, or in other words how far must the goods be identical with those supplied by the person imposing the condition? However, a governmental inquiry into the effects and desirability of resale price maintenance is now in progress, and it is possible that section 25 may be repealed before the courts are faced with these problems.

Valantine Latham Korah.*

[95] Care must be taken to see that if different types of breach are contemplated the sums are not identical; even if the selling of complete articles or of any part thereof is prohibited, it might be as well to differentiate the amount of compensation. See *Ford* v. *Armstrong*, *ante*, note 87.

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CONTEMPT BY PUBLICATION IN THE UNITED STATES

The power of courts to punish summarily for criminal contempt is, as Mr. Justice Black recently observed, " an anomaly in the law." [1] The Justice continued as follows [2]:

> " The vices of a summary trial are only aggravated by the fact that the judge's power to punish criminal contempt is exercised without effective external restraint. First, the substantive scope of the offense of contempt is inordinately sweeping and vague; it has been defined, for example, as ' any conduct that tends to bring the authority and administration of the law into disrespect or disregard.' It would be no overstatement therefore to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law. Secondly, a defendant's principal assurance that he will be fairly tried and punished is the largely impotent review of a cold record by an appellate court, another body of judges. Once in a great while a particular appellate tribunal basically hostile to summary proceedings will closely police contempt trials but such supervision is only isolated and fleeting. All too often the reviewing courts stand aside readily with the formal declaration that ' the trial judge has not abused his discretion.' But even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge. Finally, as the law now stands there are no limits on the punishment a judge can impose on a defendant whom he finds guilty of contempt except for whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of ' reasonableness ' now promulgated by the majority."

The power of English and American courts to punish summarily for constructive contempt—chiefly contempts by publication out of court—is derived from the same sources, namely, Mr. Justice Wilmot's undelivered judgment in *The King* v. *Almon* [3] and Lord Chancellor Hardwicke's pronouncements in *Roach* v. *Garvan*.[4] In practice today, however, there is a wide divergence. In England the power to punish as contemptuous publications " calculated to interfere with the due course of justice " has been carried by the courts to what some consider extreme limits. In the United States,

[1] *Green* v. *United States*, 356 U.S. 165 at 193 (1958).
[2] *Ibid.*, at 199.
[3] Wilmot, *Notes of Opinions and Judgments*, 243 (1802).
[4] 2 Atk. 469 (Ch. 1742). Also cited as *Re Read and Huggenson* and as the *St. James's Evening Post* case.

this power has been emasculated by statutory and constitutional limitations. How are we to account for this difference in direction?

In the early years of American legal development, Blackstone was often the sole source of authority and he had accepted the views of Mr. Justice Wilmot and published them as the law of England.[5] The first statute bearing on the contempt powers of federal courts was enacted in the first Judiciary Act of 1789. Section 17 stated that federal courts " shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . ." The generality of this language suggests an intent to codify those powers to punish for contempt possessed by English courts at common law. In the early nineteenth century, following what were considered several flagrant abuses of the contempt power, Pennsylvania, New York, and the Federal Government enacted statutes strictly curtailing the power to punish for constructive contempt. The Federal Act of 1831 [6] confined the summary power of punishment to ". . . misbehaviour of any person . . . in the presence of the . . . courts, or so near thereto as to obstruct the administration of justice. . . ." The lower federal courts, aware of the events prompting the enactment of this statute, respected its restrictions. Many states copied the new federal law.[7]

It is clear that the Act was intended to limit drastically the contempt power. During the following century, however, the historical antecedents of the Act became obscured and it was vitiated by a broad construction. In *Toledo Newspaper Co.* v. *United States*,[8] the Supreme Court construed the " so near thereto " provision in a causal rather than a geographical sense. As a result, substantially all of the pre-1813 powers were resurrected. Under a " reasonable tendency " test adopted to avoid the geographical limitation imposed by the Act, contempt proceedings against the press were left largely in the discretion of the trial judge. The test permitted the presiding judge to punish summarily for contempt if the publication had a " reasonable tendency " or " an inherent tendency " to interfere with justice. His discretion would not be questioned unless greatly misused.

The *Toledo Newspaper* case was the federal law of contempt by publication until 1940 when it was overruled in *Nye* v. *United*

[5] Sir John Fox has shown that Wilmot's views found their way into the *Commentaries* published in 1769, and, through them, strongly affected Anglo-American law. Fox, " The Summary Process to Punish Contempt " (1909) 25 L.Q.R. 238, 247, 253–254.

[6] 4 Stat. 487 (1831). Currently see, 18 U.S.C.A. 401 (1948).

[7] For a history of this development, see Nelles & King, " Contempt by Publication in the United States," 28 Col.L.Rev. 401, 525 (1928) and Ludwig, " Journalism and Justice in Criminal Law," 28 St.John L.Rev. 197 (1954).

[8] 247 U.S. 402 (1918).

States.[9] The Supreme Court there returned to a strict interpretation of this Act, giving the words " so near thereto " a geographical instead of a causal meaning. Since most press publication occurs neither in the presence of the court nor " near thereto " geographically, the power to punish contemptuous publications was made ineffectual.

Inasmuch as the *Nye* case concerned a federal statute the power of state courts was not affected. The following year, however, the Supreme Court held that constitutional guarantees of freedom of the press forbade both state and federal courts from punishing for constructive contempt press comment on pending cases unless the comment presented a " clear and present danger " to the orderly and impartial administration of justice.

The first case raising this issue was *Bridges* v. *California* and its companion case, *Times-Mirror Co.* v. *California*.[10] In these cases a prominent labour leader and a leading anti-labour newspaper both sought to prevent state court judges from interfering with their freedom to comment on the way pending cases should be decided. In the first case, a state judge had decided that a local of longshoremen was not entitled to transfer its allegiance from an AF of L union to a CIO union. While a motion for new trial was pending, Bridges telegraphed the Secretary of Labour:

> " This decision is outrageous. . . . Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. . . . The ILWU does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

Bridges published this telegram in the Los Angeles and San Francisco papers but Bridges alone was fined for contempt.

In the *Times-Mirror* case, two labour unionists, who had been convicted of assaulting non-union truck-drivers, requested probation. A month before the day set by the trial judge for passing on this application and pronouncing sentence, the *Los Angeles Times* published an editorial entitled " Probation for Gorillas? "

> " Two members of Dave Deck's wrecking crew, entertainment committee, goon squad or gorillas . . . have asked for probation. . . . Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. . . .
>
> " It will teach no lesson to other thugs to put these men on good behaviour for a limited time. Their ' duty ' would simply be taken over by others like them. If Beck's thugs, however, are made to realise that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to the defendants. This

[9] 313 U.S. 33 (1940).
[10] 314 U.S. 252 (1941).

community needs the example of their assignment to the jute mill."

For this the editor and the publisher were fined $100 each. After losing in the highest court of California, they appealed to the Supreme Court and won a five-to-four decision, along with their foe, Bridges.

Mr. Justice Black delivered the opinion of the court (supported by Justices Reed, Douglas, Murphy and Jackson). He referred to the clear-and-present danger test as " a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." He refused to place publications which tended to obstruct the orderly administration of justice in a special category, to which this test of constitutional immunity from punishment would not be applicable. Comments on a pending case are as much entitled to the benefit of the test as other utterances about governmental action and public questions.

What is the serious substantive evil to be averted? Mr. Justice Black stated that it appears to be two-pronged: Disrespect for the judiciary; and disorderly and unfair administration of justice. The first, he in effect discarded as a substantive evil. To consider it would " be to impute to judges a lack of firmness, wisdom or honour—which we cannot accept." " The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion."

The second—disorderly and unfair administration of justice—then is the substantive evil to be prevented and he intimated that this would be restricted to pending litigation. The court must examine the particular utterances and the circumstances of their publication to determine to what extent the evil of unfair administration of justice was likely to result, and what was the degree of likelihood.

Mr. Justice Frankfurter dissented and was joined by Chief Justice Stone and Justices Roberts and Byrnes. He recognised limits on the power to punish for contempt, but thought the majority had set the limits too narrowly. On the permissible side of the line he placed criticism of courts and judges in general and discussion of past or future cases. On the forbidden side he put publications which interfere with the impartial and calm disposition of matters under judicial consideration. Later, in another opinion, he said that since judges, " however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print." [11]

Two subsequent cases developed the philosophy of the *Bridges* case and attempted to define the limits of the clear and present

[11] *Pennekamp* v. *Florida*, 328 U.S. 331 at 357 (1946).

danger test. In *Pennekamp* v. *Florida*,[12] the court characterised the problem as one of striking " a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." The court then proceeded to reverse the contempt citation, which grew out of a severe criticism of the court during a bench trial for rape, holding that although it must protect the defendant's right to a fair trial, " Freedom of discussion should be given the widest range compatible with the essential requirements of the fair and orderly administration of justice."

In *Craig* v. *Harney*,[13] the Press was cited for contempt in attacking the judge, an elected layman, who refused to accept a jury verdict in a forcible entry and detainer action. The criticism came after the trial but during the pendency of a motion for a new trial. The Supreme Court, in reversing, stated that freedom of the Press should not be impaired " unless there is no doubt that the utterances . . . are a serious and imminent threat to the administration of justice." " The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." [14]

The Supreme Court's formula seems to grant the Press a virtual immunity from contempt rather than resolve its historic struggle with the courts. Nevertheless, the actual scope of this immunity continues to be uncertain. First of all, the clear and present danger test has been reformulated in a non-contempt context. If the danger does not have to be imminent, the courts would have more control over Press interference. Modification of the imminence requirement may be forthcoming. In *Dennis* v. *United States*,[15] the Supreme Court placed emphasis on the magnitude rather than the imminence of the evil. " In each case (courts) must ask whether the gravity of the ' evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The evil there was the overthrow of the government.

In addition, in each of the Supreme Court cases the danger asserted was to judge, not jury deliberations. Although no explicit distinction was made, the opinions leave room for the inference that the clear and present danger test might lead to different results if jury decisions are threatened. If jurors are more susceptible to influence than judges, then the same comment which constitutes no danger in the one instance could still be found a danger in the other.

The judge-jury distinction was advanced for the first time in

[12] *Ibid.*, at 336 and 347.
[13] 331 U.S. 367 (1947).
[14] *Ibid.*, at 373 and 376.
[15] 340 U.S. 494 at 510 (1951).

State v. *Baltimore Radio Show*.[16] A little girl had been brutally murdered in one of the parks of Washington, D.C. Ten days later, an eleven-year-old girl was dragged from her bicycle on one of the public streets of Baltimore, Maryland, and stabbed to death. Because of the similarity and atrociousness of the crimes, great public alarm was aroused and parents became most concerned for the safety of their children. Three nights later a Baltimore radio announcer opened his broadcast with the words " Stand by for a sensation." He then stated that Eugene James had been arrested and charged with the second murder. He went on to say that James had confessed to the crime, that he had a long criminal record, that he had gone to the scene of the crime with the police and there re-enacted the murder, and that he dug up the knife he had used to kill the little girl. Similar newscasts were made over other radio stations located within and without the state. Two months later James stood trial and was convicted of first degree murder, his confession and prior convictions being received in evidence. His counsel had waived jury trial because he felt he could not risk a jury trial in a community that had been so aroused. The trial was held before a three judge court.

Three Maryland Broadcasting companies were cited for contempt under a rule of the court making it contempt to publish any matter " which may prevent a fair trial, improperly influence the court or the jury, or tend in any manner to interfere with the administration of justice." [17] The Criminal Court of Baltimore City found them guilty and imposed fines, the trial court stating that the broadcasts constituted " not merely a clear and present danger to the administration of justice, but an actual obstruction of the administration of justice, in that they deprived the defendant of his constitutional right to have an impartial jury trial." [18] On appeal, the Court of Appeals of Maryland reversed the convictions.[19] It relied largely upon the three decisions of the Supreme Court of the United States applying the " clear and present danger " test to the contempt power—that a publication to be contemptuous and not within the protection of the First and Fourteenth Amendments must constitute a clear and immediate threat to the administration of justice and a fair trial. To the argument that the three cases involved court trials and criticisms of judges and that a different view should be taken when juries or potential juries are concerned, the court dismissed the distinction as " hardly tenable." Judges are no more immune to human influences than the rest of mankind. Conversely, jurors are capable of the same firmness and impartiality as the judiciary.

[16] 193 Md. 300, 67 A.2d 497 (1949).

[17] *Ibid.*, at 505.

[18] The opinion of the trial court is set out in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912 at 916 (1950).

[19] See *supra*, note 16.

The Supreme Court of the United States denied certiorari [20] but Mr. Justice Frankfurter wrote a long opinion emphasising that a denial of a petition for certiorari carries with it no implication regarding the court's views on the merits of the case. " The one thing that can be said with certainty about the court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland." [21] The justice, a member of the court's minority in favour of a rule more restrictive of Press comment, supplemented his opinion with a sixteen-page appendix cataloguing twentieth-century English cases concerning contempt of court for comments prejudicial to the fair administration of criminal justice.

Unfortunately, the *Baltimore* case did not settle the possibility of a future judge-jury distinction. The specific refusal to affirm or reverse leaves state courts free to determine what limits the " clear and present danger " test sets on their power to restrict Press comment in jury cases. Notwithstanding the Maryland court's refusal to limit the presumption of fortitude to judges, it is contrary to one of the basic assumptions of the law of evidence to equate the stamina of judges and jurors. The assumption may be wrong but the rules of evidence are based upon it, namely, that jurors must be protected from the undue prejudice of improper evidence upon which, however, the judge may safely pass. And a trial judge who erroneously admits evidence in a trial before him alone will rarely, if ever, be reversed. The appellate courts assume that he excluded it from his deliberations.[22] The greatest danger to fair trial in a jury case arises when the Press publishes evidence not admissible at the trial, such as a coerced confession or the defendant's criminal record. And admissible evidence may not be offered at the trial. Its publication in the Press is objectionable as not given under oath nor subject to cross-examination. Finally, produced evidence may be misrepresented by misleading headlines, one-sided selection of material, or other slanting of the report.

In the United States, the contempt power is a negligible device for protecting a defendant's right to a fair trial. As a result, the courts have resorted to other techniques in an effort to afford this protection. The most common safeguards against prejudicial pretrial publicity are a postponement of the trial, a change of venue and a careful *voir dire* examination of persons called for jury duty to eliminate any prejudiced person.[23] None of these is satisfactory. A change of venue may involve delay, extra expense or inconvenience. Its utility is limited by the existence of state-wide—

20 *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912 (1950).

21 *Ibid.*, at 919.

22 See McCormick, *Evidence*, 137 (1954).

23 See Comment, " Free Press—Fair Trial," 50 J.C.L. & Crim. 374 (1959) and Note, " Free Press; Fair Trial—Rights in Collision," 34 N.Y.U.L.Rev. 1278 (1959).

even regional and nation-wide—newspaper, radio and television coverage. And if the trial moves, the publicity may move with it. A continuance, too, may involve extra expense or inconvenience and there is always the possibility the publicity will be revived. Furthermore, the law with respect to changes of venue and continuances requires not only proof of prejudicial publicity but also of resulting public hostility so strong as to make a fair trial unlikely. This standard of proof is too high. With regard to the *voir dire* it is not enough to show that prospective jurors have heard or read publicity items critical of the defendant. So long as the juror expresses an ability to decide the case solely on the evidence presented in court a challenge for cause will usually not be sustained. This is so even where the prospective juror admits having formed an opinion as to the defendant's guilt or innocence, on the basis of the pre-trial publicity.[24] Furthermore, defence counsel is placed in a real dilemma. If he questions jurors about Press reports he is likely to refresh their memories of the events reported or to drive home the importance of the remembered event.

In some situations the defendant may waive jury trial and proceed before a judge. Defendant's attorney felt compelled to do this in the *Baltimore Radio* case. However, in some states a jury trial cannot be waived in capital cases. In others, the prosecutor must consent to the waiver and the judge approve and such consent or approval may not be forthcoming.[25] Lastly, the defendant may wish to exercise his constitutional right to a jury trial. To coerce its waiver by Press publicity raises additional difficult questions of due process.

During the trial itself reports are often highly coloured and replete with editorial comment on the evidence and the conduct of the proceedings. In cases which arouse strong public feeling the Press may become highly partisan, sometimes trying to outdo the parties in procuring evidence and publishing material ruled inadmissible because of its prejudicial effect. Thus, the problem of assuring an accused a fair and impartial trial by jury does not end with the impanelling of an " impartial " jury. The jurors must remain impartial.

Instructions by the trial judge at the outset and close of the trial that jurors should avoid reading or listening to commentaries on the trial and that only the evidence presented in court should be considered in reaching a verdict are usually considered sufficient to protect the defendant against inflammatory publicity. Although these instructions may keep jurors away from prejudicial publications it is difficult to understand how they prevent jurors from being unconsciously influenced by what they have already read.

[24] *Ibid.*

[25] See Donnelly, " The Defendant's Right to Waive Jury Trial in Criminal Cases," 9 U.Fla.L.Rev. 247 (1956).

Not infrequently jurors do read inflammatory newspaper publicity during the trial. When this occurs the usual practice has been for the judge to question them as to whether they have been prejudiced and whether they can still decide solely on the basis of the evidence offered in court. If the jurors answer that they can still decide solely on the basis of the evidence a motion for a mistrial is usually denied. However, in *Marshall* v. *United States*,[26] the Supreme Court recently reversed a conviction where this had occurred. The petitioner was convicted of selling drugs without the required prescriptions. In an effort to refute the defence of entrapment, the Government sought to prove that he had previously practised medicine without a licence. The trial judge refused the offer of proof as having no bearing on the issues and as too prejudicial. During the course of the trial two newspaper accounts containing this information came to the attention of some of the jurors. The judge called the jurors into his chambers and asked each of them whether they had seen these articles. Although some had read the articles, all stated they had not been influenced by them and that they could decide the case solely on the basis of the evidence of record. Thereupon the trial judge denied the motion for a mistrial. The Supreme Court reversed on the ground that if the information was so prejudicial that the trial judge refused to admit it, it was error to deny the motion for a mistrial, since the prejudice it would arouse was sure to be as great if read in the newspaper. The court recognised the large discretion of the trial judge in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial but apparently felt the facts of the *Marshall* case were quite special. Although this may indicate nothing more than a sensitivity toward the special facts of this case an element of uncertainty into an area which appeared well-settled has been introduced. Lower courts may read the decision as a limitation of their discretion and feel compelled to grant a mistrial where formerly they would have denied the motion. It should be noted that the decision was not based on any constitutional ground of due process but upon the general supervisory power of the court to formulate and apply proper standards for enforcement of the criminal law in the federal courts.

That Press conduct and prejudicial newspaper coverage may be so flagrant as to violate due process was indicated by Justices Jackson and Frankfurter in *Sheppard* v. *Florida*.[27] There the defendants had been convicted of rape and sentenced to death. A majority of the court reversed because of racial discrimination in jury selection. However, Mr. Justice Jackson wrote a concurring opinion in which Frankfurter joined, charging the majority with

[26] 360 U.S. 310 (1959).
[27] 341 U.S. 50 (1951).

emphasising the trivial and ignoring the important issues. He said [28]:

> "But prejudicial influences outside the courtroom, becoming all too typical of a highly publicised trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the Press and the public opinion which it generated."

As the *Sheppard* case, the *Hauptmann* case,[29] and others,[30] indicate, many American newspapers handle crime news so unfairly and sensationally that they deprive the accused of an impartial jury. If they lived in England, the majority of American newspaper editors and crime reporters would probably be sent to jail for contempt. Here is another example of quite recent date:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the pre-indictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life."

Notwithstanding this exegesis the Supreme Court of Ohio [31] upheld Sam Sheppard's conviction of second-degree murder, and the Supreme Court of the United States declined [32] to review the case.

There is much dissatisfaction in the United States with existing efforts to resolve the conflict between a free Press and an impartial trial. Prejudicial publicity constitutes a serious threat to an accused's right to an impartial jury trial. He is without adequate means to combat it. Various solutions have been proposed.

Perhaps the chief source of prejudicial publicity is the Press release or conference by persons connected with the trial—defence or prosecuting attorneys or police officers. A typical example is *Strobel* v. *State of California*.[33] Strobel was apprehended in connection with the brutual sex murder of a six-year-old girl. His

[28] *Ibid.*, at 51.
[29] For an excellent account of this case see Robbins, "The Hauptmann Trial in the Light of English Criminal Procedure," 21 A.B.A.J. 301 (1935).
[30] The cases are collected in Wolfram, "Free Press, Fair Trial and the Responsibility of the Bar," (1954) 1 Crim.L.Rev. 3.
[31] *State* v. *Sheppard*, 165 Ohio St. 293, 135 N.E. 2d 340 (1956).
[32] 352 U.S. 910 (1956).
[33] 343 U.S. 181 (1952).

arrest and subsequent confession attracted what Mr. Justice Clark referred to as " a spate of newspaper publicity." For, in the words of the court, " between the time of the murder and the time of petitioner's arrest, newspapers of general circulation in the Los Angeles area featured in banner headlines the ' manhunt ' which the police were conducting for petitioner. On the day of petitioner's arrest these newspapers printed extensive excerpts from his confession in the District Attorney's office, the details of the confession having been released to the Press by the District Attorney at periodic intervals while petitioner was giving the confession. On the following Monday, four days later, Los Angeles newspapers reprinted the full text of that confession as it was read into the record at the preliminary hearing. Most of these events were given top billing on the front page of the papers, and were accompanied by large headlines. Petitioner was variously described, both in headlines and in the text of news stories, as a ' werewolf,' a ' fiend,' a ' sex-mad killer,' and the like. The District Attorney announced to the Press his belief that petitioner was guilty and sane." [34]

Strobel's conviction was affirmed by the Supreme Court of California and, later, by the Supreme Court of the United States. Mr. Justice Clark, writing for the majority, stated that petitioner had failed to demonstrate that the newspaper accounts had aroused against him such prejudice in the community as to " necessarily prevent a fair trial." [35] In his dissent, Mr. Justice Frankfurter stated [36]:

> " I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of the traditional concept of the ' American way of the conduct of a trial.' "

Although Canon 20 of Professional Ethics [37] looks with strong distaste upon any attorney who publicises his case, it has largely been ineffective. Not only has it not been enforced by the Bar but is inadequate in its phrasing. It does not cover releases made by law enforcement officers other than attorneys nor releases made to radio or television media. Nor does it strictly condemn all or a particular type of publicity but merely states that generally publicity is to be condemned. If Bar associations would get tough with members who give tips and stories to the Press in violation

[34] *Ibid.*, at 192.
[35] *Ibid.*, at 193.
[36] *Ibid.*, at 201.
[37] ABA, Canons of Professional Ethics No. 20, states: " Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

of Professional Canon No. 20, defendants in criminal jury trials would receive considerable protection since such " leaked out " information is far more damaging to the accused than mere conclusions by the Press as to his guilt or innocence.

In the United States there is a right of appeal from a criminal contempt conviction. Although full review is not always given in state courts, it is now the federal practice. A full review seems highly desirable, particularly when the contempt charged contained elements of personal criticism or attack upon the judge.

In some quarters today there are suggestions for additional procedural reforms. Recently, three justices of the Supreme Court were willing to wipe out a century and a half of legislative and judicial history by holding that contempts not committed in the presence of the court are " entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for ' all criminal prosecutions.' " [38] *Green* v. *United States* [39] involved the summary conviction of two Communist leaders who, after being convicted for violation of the Smith Act, had jumped bail and had hidden out for five years. Four members of the court, speaking through Justice Harlan, voted to sustain the conviction. " The answer to those who see in the contempt power a potential instrument of oppression lies in assurance of its careful use and supervision, not in imposition of artificial limitations on the power." [40]

Mr. Justice Black, joined by the Chief Justice and Mr. Justice Douglas, filed a vigorous and eloquent dissent. Black admitted he was opposing an unbroken line of Supreme Court decisions but thought these decisions had been based on the assumption that the summary contempt power ran back in English law beyond the memory of man. Citing a great deal of historical research, including that of Sir John Fox [41] and Professor Frankfurter,[42] Black concluded that there had been no " immemorial usage " allowing summary punishment. It was probably not older than the eighteenth century. Since the opinion of Mr. Justice Wilmot, who was responsible for the " immemorial usage " legend, had not been published until after the adoption of the Constitution, and since the Founding Fathers had shown such concern for jury trials, Black was unconvinced that the Framers had meant to exclude contempt from the normal procedural protections.

The intent of the Framers, however, was probably less important to his dissent than the belief that no official should be granted " autocratic power ":

[38] *Green* v. *United States*, 356 U.S. 165 at 195 (1958).
[39] 356 U.S. 165 (1958).
[40] *Ibid.* at 188.
[41] Fox, *Contempt of Court* (1927).
[42] Frankfurter & Landis, " Power to Regulate Contempts," 37 Harv.L.Rev. 1010 (1924).

> " When the responsibilities of lawmaker, prosecutor, judge, jury, and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused." [43]

Mr. Justice Brennan added a fourth dissent on the ground that there was insufficient evidence to justify a finding beyond a reasonable doubt that the defendants had knowledge that the surrender order had been entered.

This four-to-four division made Mr. Justice Frankfurter's vote crucial. Filing a separate opinion, Frankfurter, the judge, relegated Frankfurter, the professor, to a lower place in the judicial process: " The fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions." [44] After calling the roll of the fifty-three distinguished justices of the Supreme Court who had upheld the summary contempt power, Frankfurter found himself unwilling to break with tradition and voted to sustain the conviction.

Mr. Justice Black also made the suggestive observation that the tendency of the court to restrict the substantive scope of the contempt power to narrow bounds is attributable in substantial part to " a deeply felt antipathy toward the arbitrary procedures now used to punish contempts." [45]

Comment on the work of a court not related to pending proceedings ranges from a law journal's calm discussion of the merits of a decision to a libellous attack upon the integrity of the judge. The English courts declare the right to honest criticism of the work of the court but reserve the power to punish scandalous attacks upon the court itself. This power has been used infrequently but two rather recent examples show that it will be used on occasion. One is *R.* v. *Editor of the New Statesman.*[46] In this case, the editor commented upon a case in which Dr. Marie Stopes, an advocate of birth control, had suffered a verdict against her in a libel action for suggesting that the *Morning Post* had suddenly refused to print her advertisements because of Roman Catholic influence. The *New Statesman's* article said: " The serious point in this case, however, is that an individual owning to such views as those of Dr. Stopes cannot apparently hope for a fair hearing in a court presided over by Mr. Justice Avory—and there are so many Avorys." The editor was found guilty of contempt and ordered to pay all costs of the proceedings. The editorial " imputed," said Lord Hewart, " unfairness and lack of impartiality to a judge

[43] 356 U.S. 165 at 198.
[44] *Ibid.*, at 189.
[45] *Ibid.*, at 196, note 5.
[46] (1928) 44 T.L.R. 301.

in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties." [47]

A later case reached a similar result. In *R.* v. *Colsey*,[48] the editor of *Truth* was ordered to pay a fine of £100 and costs for having commented on Lord Justice Slesser's judgment in the case of *R.* v. *Minister of Labour* in the following terms: " Lord Justice Slesser, who can hardly be altogether unbiased about legislation of this type, maintained that really it was a very nice provisional order or as good a one as can be expected in this vale of tears." Lord Justice Slesser had been attorney-general in a former Labour government which supported this legislation. Professor Goodhart has commented on the case as follows: " This case seems to carry the doctrine of constructive contempt to its extreme limits, for the administration of justice can hardly have been seriously endangered by the editor's mild but expansive humour." [49]

Prior to the *Bridges* case the majority of the states held that this branch of the contempt power violated constitutional principles of free speech and in the *Bridges* case the Supreme Court categorically rejected " disrespect for the judiciary " as a substantive evil which would warrant any form of restriction upon speech. This exercise of the contempt power has little justification and is subject to much abuse. The rationale for punishing abusive attacks upon the court is that they create public dissatisfaction with the judiciary and the administration of justice. As a result parties are discouraged from bringing rightful claims to the courts and may ultimately take the law into their own hands. The countervailing argument is that the only way for courts to secure public respect is to earn it by the ability, impartiality and essential justice of their proceedings; that if the courts are inefficient, biased or corrupt, they should be quickly exposed and the evil eliminated.

Although the Administration of Justice Act of 1960 [50] does not appear to deal with " scandalising the court," it has made changes in the law of contempt that meet with considerable approval by those in the United States who advocate a restoration of the power to punish for contempts by publication. In authorising an appeal in cases of contempt of court, the Act is in agreement with long-standing practice in the United States. Section 12, which provides that the publication of information relating to proceedings in private shall not in itself constitute contempt of court, with certain exceptions, is in accord with the law in most American jurisdictions. Apparently, the purpose of the section is to modify the judgment in *Alliance Building Society* v. *Belrum, Ltd.*[51]

[47] *Ibid.*, at 303.
[48] See Note (1931) 47 L.Q.R. 315.
[49] Goodhart, " Newspapers and Contempt of Court in English Law," 48 Harv. L.Rev. 885 at 904 (1935).
[50] 8 & 9 Eliz. 2, c. 65. See p. 261, *post.*
[51] [1957] 1 All E.R. 635.

It is section 11, however, that is of most interest. *R.* v. *Odhams Press Ltd.*[52] and *R.* v. *Griffiths*,[53] imposing strict liability for innocent publication and dissemination, were not greatly admired in the United States. These two cases were apparently the targets of section 11, which makes lack of knowledge " having taken all reasonable care " a defence. Although the Supreme Court of the United States has not passed on the question of strict liability for contemptuous publications it has shown a reluctance to extend the area in which strict liability can be made the basis of criminal liability. The recent case of *Smith* v. *California* [54] is illustrative. Appellant, the proprietor of a bookstore, was convicted under a Los Angeles ordinance making it unlawful " for any person to have in his possession any obscene or indecent writing, (or) book . . . in any place of business where . . . books . . . are sold or kept for sale." Appellant was convicted on the basis of possession alone. The ordinance had been construed by the California court as requiring no element of scienter-knowledge by appellant of the contents of the book—and thus the ordinance was construed as imposing strict or absolute liability. In holding the ordinance unconstitutional, Mr. Justice Brennan writing for the majority said [55]:

> " The appellee and the court below analogise this strict-liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors—in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used. . . . His ignorance of the character of the food is irrelevant. There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the Press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfils its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of

[52] [1957] 1 Q.B. 73. See Note (1957) 73 L.Q.R. 8. Also, see Hall Williams, " Unintentional Contempt of Court " (1957) 20 M.L.R. 275 at 276.
[53] [1957] 2 Q.B. 192.
[54] 361 U.S. 147 (1959).
[55] *Ibid.* at 152.

scienter that: 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience': *The King* v. *Ewart*, 25 N.Z.L.R. 709, 729 (C.A.). And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarise himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

A similar rationale would condemn absolute liability in contempt cases.

Perhaps the most effective way to give real meaning to the guarantee of an impartial jury trial in the United States is to restore the contempt power to the courts. Is it possible to draft a narrow contempt statute that would survive American constitutional limitations and still be effective? Such a statute to cover the period beginning with the bringing of formal charges (or perhaps when arrest is imminent) and ending with conviction or acquittal. There are reasons to believe it could be done. First of all, in the *Bridges* case Mr. Justice Black said [56]:

"It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307–308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature. . . .' For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation."

Secondly, in denying certiorari in the *Baltimore* case, the court

[56] 314 U.S. 252 at 260 (1941). In reliance upon this quotation, at least one state has upheld the constitutionality of its contempt statute. *Weston* v. *Commonwealth*, 195 Va. 175, 77 S.E. 2d 405 (1953), noted in 22 Geo.Wash. L.Rev. 242 (1953). Also see *People* v. *Goss*, 10 Ill. 2d 533, 141 N.E. 2d 385 (1957) and *Re Jameson*, 340 P.2d 423 (Col. 1959) (dissenting opinion).

has left open the judge-jury distinction and has not specified the limits the " clear and present danger " test sets on the powers of courts to restrict Press comment in jury cases.

Thirdly, the test itself has been reinterpreted in the Smith Act cases as emphasising probability rather than imminence. This new interpretation has not been applied as yet in the contempt context.

It also appears that a statute would have a better chance of survival if it provided certain procedural safeguards for the defendant such as a right of appeal, a jury trial, a trial before a different judge, and a limitation on the amount of fine or term of imprisonment that could be imposed for violations.

On the substantive side, it would be unwise to use broad and general terms that could be construed as re-enacting the common law contempt power. Instead, a legislative determination of specific evils threatening a fair trial should be specified. Some of the types of situations that might be covered are the following:

1. The issuance by the police authorities, the prosecutor, counsel for the defence, or any other person having official connection with the case of any of the following:
   (a) Any criminal record or photograph of the accused except as part of an official notice to alert the community to the fact that a potentially dangerous person is eluding or has escaped from lawful custody;
   (b) Any alleged confession or admission of fact bearing upon the guilt of the accused;
   (c) Any statement of personal opinion as to the guilt of the accused;
   (d) Any statement that a witness will testify to certain facts or opinions;
   (e) Any comment upon evidence already introduced;
   (f) Any comment as to the credibility of any witness;
   (g) Any statement of matter excluded from evidence by the court.
2. The publication by newspaper, magazine, radio or television of any material obtained as a result of a violation of the statute.

These instances are meant to be suggestive rather than definitive but they do cover most of the abuses by officials and the Press in the United States. With appropriate changes the same restrictions could be made applicable to civil cases. And, underlying them all, should be the elimination of absolute liability. Criminal liability in this area should be limited to intentional or reckless conduct. Whether negligence should be a basis of liability is more debatable.

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REPUBLIC AND MANDATE

CONSIDERABLE credence has been given recently to the view, expressed initially by Mr. Dingle Foot, Q.C., M.P., in a letter to *The Times*,[1] that when South Africa becomes a Republic (within or without the Commonwealth), the Union Government will no longer be entitled in law to administer the Mandated Territory of South-West Africa. Mr. Foot's contentions were that the matter would at least be questionable on the attainment of the status of a Republic and beyond argument if republicanism is accompanied by non-membership of the Commonwealth.

The argument in favour of such a mode of termination of the Mandate rests on the form in which the mandate was granted by the League and accepted by the mandatory Power. Mr. Foot concluded his letter, and the point is endorsed by two subsequent leaders in *The Times*,[2] that it can never have been contemplated that the " duties imposed by the Mandate upon the British Crown should be carried out by a foreign power [which South Africa would automatically become]." The statement is founded upon the fact, if fact it be, that the mandate was granted to and accepted by the " British Crown " and has for practical purposes been administered by the Union Government on behalf of the Crown. Determination of that legal link would mean, so the argument runs, that by a reversion the mandate becomes vested in the Crown.

Reliance is placed—in fact it is the only passage cited by Mr. Foot—upon the second paragraph of the preamble to the mandate. It reads:

> " Whereas the Principal Allied and Associated Powers [3] agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations) of the said Treaty, a mandate should be *conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa* [4] to administer the Territory. . . ."

It is suggested that this is manifestly a conferment of the mandate upon the British Crown. If there were no contrary indications, it might have to be argued contrariwise that only a state and not

[1] May 13, 1960.
[2] September 5 and 14, 1960.
[3] These were Britain, France, United States, Italy and Japan. Since the United States was not a member of the League only four of the Powers were party to the Treaty establishing the Mandate. Normally, the United States Government gave its informal approval to the selection of the mandatory power, but for some inexplicable reason this appears not to have been given in the case of South-West Africa: see pamphlet, " Mandate in Trust," published by Africa 1960 Committee, on September 5, 1960, price 1s. 6d.
[4] My italics.

an individual could administer a mandated territory, a rubric for which the " British Crown " could not qualify. Article 22 of the Covenant refers specifically to " advanced nations " as " mandatories on behalf of the League " and in the case of South-West Africa the Union was selected, as the " advanced nation " which was geographically contiguous to the mandated territory. Moreover, " His Britannic Majesty," namely, King George V, was not himself a member of the League of Nations; the Union of South Africa was a founder member. And Article 22,[5] with its reference to " other members of the League," contemplates that the mandatories must be members of the League. This contention is reinforced by the provision of Article 7 of the Mandate which confers compulsory jurisdiction on the Permanent Court of International Justice in disputes between the " mandatory " and " another member of the League of Nations." It would seem therefore that far from the League's intention being to confer the mandate on the " British Crown " it sought to regulate the system of mandated territories among members only of the League of Nations.

That this is made clear cannot be doubted when the third paragraph of the preamble and Article 1 of the Mandate, to which Mr. Foot made no reference, is read. That part of the preamble states:

> " Whereas *His Britannic Majesty for and on behalf of the Government of the Union of South Africa* [6] has agreed to accept the Mandate. . . ."

and Article 1 echoes this by stating,

> " the territory over which a Mandate is conferred *upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa.*[6]. . ."

There is admittedly a clash between the form of expression of the conferment of the Mandate in the second paragraph of the preamble and these two passages. Even if there were no other external considerations which tended to support either contention, the operative part would be the wording in the Treaty establishing the Mandate. But reliance need not only be placed on a construction of the international agreements. Judicial interpretation of these and identical treaties establishing mandates has been handed down in three Commonwealth countries.

In *R.* v. *Christian*,[7] the Appellate Division of the Supreme Court of South Africa was concerned with the question whether a citizen of South-West Africa owed allegiance to the Crown so as to make him liable for the charge of treason. In the course of the judgment de Villiers J.A. said [8]:

5 See the concluding words of the fifth paragraph.
6 My italics.
7 [1924] A.D. 101.
8 *Ibid.* at p. 119.

> ". . . the Council of the League, on the 17th December 1920, issued a Mandate in reference to South-West Africa to the terms of which, it is stated in one of the recitals, the Mandatory agreed. The Mandate itself is not very happy in indicating who the mandatory of South-West Africa is. In the second recital it is said that the Principal Allied and Associated Powers agreed that a Mandate should be conferred ' on His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa.' Whereas the third recital states that ' His Britannic Majesty for and on behalf of the Union of South Africa ' has agreed to accept the Mandate; and according to Article 1 the Mandate has conferred upon ' His Britannic Majesty for and on behalf of the Government of the Union of South Africa.' The latter position is in my opinion the correct one."

The learned appeal judge then cites Article 22 of the Covenant and concludes that the Mandate was not conferred on the " British Empire " but upon the Union Government as an independent sovereign state and a member of the League.

Much the same view was taken by van den Heever J. in *R.* v. *Offen*,[9] a case in the High Court of South-West Africa. The judge stated [10]:

> " The Mandate was conferred on the Union. . . . The language used in the instruments referred to may have been confusing because of the embarrassing situation in which members of the Commonwealth found themselves, but the intention is quite clear. The Covenant was an international document and the parties to it were ' states ' or ' nations.' "

The learned judge preferred to say that the mode of expression in the different recitals of the preamble made no difference, but that " for the purpose of the allocation of mandates the King acted as head of State of a separate member, the Union." And the learned judge added [11]:

> " The signatories to the Covenant were a little concerned about the purely domestic question as to which organs within the Union would exercise the executive and which the legislative function over the Mandated Territory. All that is meant by these expressions is that the mandate is conferred on His Majesty's Government of the Union of South Africa; this is on South Africa as a separate member of the League."

The matter was further restated by Ostler J. in *Tagaloa* v. *Inspector of Police*,[12] a New Zealand case in the Court of Appeal dealing with the mandate of Samoa. The learned judge in this connection said [13]:

[9] [1934] S-W.A. 73.
[10] *Ibid.*, at p. 84.
[11] *Ibid.*, at p. 85.
[12] [1927] N.Z.L.R. 883.
[13] *Ibid.*, at p. 901.

> " The mandate for Samoa was conferred by the Council of the League of Nations upon His Majesty the King for and on behalf of the Government of the Dominion of New Zealand. That means it was conferred directly on the Dominion and the Dominion is the sovereign power responsible to the League of Nations. . . . The authority is given by the League of Nations directly to the Dominion as a Member of the League."

And Sim A.C.J. in the earlier judgment of the court [14] said that " it was contended . . . that His Britannic Majesty, and not New Zealand was the mandatory. . . . But this, in our opinion is not so. The Government of the Dominion of New Zealand was intended to be the mandatory. That is clear, we think, from the terms of the Mandate. . . ."

A final judicial pronouncement which establishes the unanimity of the Commonwealth courts on this point comes from the judgment of Evatt J.[15] in *Ffrost* v. *Stevenson*,[16] a case in the High Court of Australia dealing with the mandated territory of New Guinea. That learned judge, with characteristic learning, stated [17]:

> " The New Guinea Act correctly assigns the authority of the Commonwealth [18] over the territories to the action of the Principal Allied and Associated Powers in nominating it as mandatory and section 5 of the Act gives statutory authority to the Governor-General not to accept the Mandate from the hands of the King but to accept the Mandate so soon as it is issued to the Commonwealth from the Council of the League of Nations. In other words, the greatest care was taken by the Commonwealth advisers to protect the international status of the Commonwealth as such and to this end the King, acting through his Commonwealth Ministers, accepted the Mandate directly from those who in the eyes of international law had power to grant it. . . . All the documents show that whatever authority was obtained by the Commonwealth in relation to New Guinea was by original grant to itself (the Commonwealth being of course identified with the King in Right of the Commonwealth)."

It is not without moment that all the Mandates were granted and accepted before the Resolutions of the Imperial Conferences of 1923, 1926 and 1930. By virtue of these internal Commonwealth declarations the exercise of the treaty-making power of any Dominion cannot now be regarded as a delegation from any central government; it is derived from their own status.[19] The formal

14 *Ibid.*, at p. 894.

15 Evatt J., after resigning from his High Court judgeship to return to politics, became the Chief Justice of New South Wales last year.

16 (1937) 58 C.L.R. 528.

17 *Ibid.*, at pp. 587–588.

18 References in this extract to " Commonwealth " are to the " Commonwealth of Australia."

19 Oppenheim, *International Law*, Vol. I, Peace, 8th ed., p. 886.

recitals in the preamble to the Mandate were therefore merely expressed thus to conform with the procedure then adopted by Commonwealth countries. So far as the international community was concerned, each dominion country was an independent sovereign state, alone capable of being a mandatory Power under the Covenant of the League of Nations. There could be no question of a divisible mandatory power.

South Africa's impending transition from a dominion of the Crown to a republic within the Commonwealth changes neither its international person nor its personal identity. All the international rights and obligations of the Union Government will remain unaffected. Equally, even if the Union ceases to be a member of the Commonwealth, no international legal change occurs, whatever the political repercussions.

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STATUTES

Administration of Justice Act, 1960

On reading this Act one is left with the feeling of having lost a shilling and found a sixpence. The Act introduces some welcome reforms, but also abolishes rights which have long been considered fundamental to the administration of the criminal law. Although the Act is mainly concerned with the structure of the appellate courts, it also contains reforms in fields of law which have been the special concern of the legal profession, the courts, the Press, and parliamentarians of both parties. Space will not permit a thorough consideration of all the provisions, and, therefore, this note will deal with the three broad subjects of appeals in criminal matters and habeas corpus proceedings, contempt of court, and habeas corpus.

Appeals in Criminal Cases and Habeas Corpus Proceedings

The Act alters the procedure for, and extends the range of, appeals to the House of Lords in a criminal cause or matter,[1] and grants for the first time a right of appeal in cases of contempt of court and creates new rights of appeal in habeas corpus proceedings.[2] In the case of appeals to the House of Lords, the right of appeal is available to the prosecution as well as the defence.[3] The changes brought about by the Act establish an elaborate system of appeals, so that the present position is as follows:

An appeal will lie to the House of Lords from:

(a) the court of Criminal Appeal (or the Courts-Martial Appeal Court [4]) in a criminal cause or matter, and in original cases of contempt of court [5];

(b) the court of appeal in cases of contempt of court, both original [6] and appellate (in respect of orders made by High Court and county court judges),[7] and in civil proceedings for habeas corpus [8];

(c) a Divisional Court of the High Court in a criminal cause or matter,[9] in cases of contempt, both original and appellate (from orders of a magistrates' court under section 54 (3) of

1 s. 1.
2 ss. 13, 15.
3 ss. 1 (1), 13 (2), 15 (1).
4 s. 10, Sched. I.
5 s. 13 (2) (*c*).
6 s. 13 (2) (*c*).
7 s. 13 (2) (*b*) and (*c*).
8 s. 15 (1). The only innovation here is the right of appeal against an order for the release of the person detained.
9 s. 1 (1).

the Magistrates' Courts Act, 1952, and of other inferior courts),[10] and in criminal applications for habeas corpus.[11]

In every case an appeal can only be heard by the House of Lords if leave of the court below or of the House of Lords has first been obtained. But, in criminal cases, and where a second appeal in cases of contempt is desired, leave to appeal can only be granted if two conditions are satisfied.[12] According to section 1 (2) of the Act, the lower court must first certify that the case involves a point of law of *general* public importance. This is wider than the previous requirement that the point of law be one of *exceptional* public importance.[13] Once it is established that there is a point of law of general public importance one would think that there could be no reason for refusing leave to appeal. But the Act further requires that the point be one which ought to be considered by the House of Lords. It was said in Parliament that leave should be refused on this ground if the point is an obscure one and not likely to arise again, or is so clear as not to require further argument, or is so long established that it ought not to be disturbed.[14] If the point of law is so obscure and isolated, or is so clear, it is difficult to see how it can be one of general public importance. Although it may be a good reason for refusing an appeal by the prosecution, it is hardly a sufficient justification for ignoring the interests of the defendant in having his case authoritatively decided by the final court of appeal. The third reason is even more difficult to accept in the context of criminal law. The very object of the House of Lords is to correct the errors of inferior courts, whether they are recent or long established. There may be reasons for applying the *communis error* doctrine in civil cases,[15] but to do so in criminal cases seems to contradict the apparent policy not only of the Court of Criminal Appeal [16] and the Privy Council [17] but also of the House of Lords itself.[18] The argument to the effect that removal of these restrictions would leave the courts without prescribed criteria by which to consider applications, and so result in a flood of appeals, does not hold water, since it is only fair to assume that the courts would consider applications with the same caution as is exercised in civil and other criminal cases where leave to appeal is required. The reasons given for the restrictions are far from convincing,[19] but if the section is interpreted in that manner by the

[10] s. 13 (2) (*c*).
[11] ss. 1 (1), 15 (1).
[12] ss. 1 (2), 13 (4).
[13] Criminal Appeal Act, 1907, s. 1 (6).
[14] See H.L.Parl.Deb., Vol. 222, col. 250; Official Report of Standing Committee A.(H.C.), col. 31.
[15] *Cf. Bourne* v. *Keane* [1919] A.C. 815, 874.
[16] *R.* v. *Taylor* [1950] 2 K.B. 368, 371.
[17] *Gideon Nkambule* v. *R.* [1950] A.C. 379, 397–398.
[18] *Woolmington* v. *D.P.P.* [1935] A.C. 462.
[19] One would think that the reasons for removing the restrictions in cases of contempt and habeas corpus apply with equal force to other appeals. The Attorney-General considered that there was no reasonable distinction in so far as the extension of the prosecution's right of appeal was concerned. See Official Report of Standing Committee A (H.C.), col. 87.

courts, the only substantial change would appear to be the removal of the Attorney-General's discretion in criminal appeals.[20] This alone is greatly to be welcomed, although it may tend to inhibit Members of Parliament from questioning the exercise of the discretion by the judiciary. The only argument in favour of the restrictions seems to proceed on the basis that the Court of Criminal Appeal is the final court of appeal in the majority of criminal cases. If that is so, the Act does strengthen the case for a permanent court along the lines of the Court of Appeal.[21]

Contempt of Court

The only real change in substantive law is contained in the sections dealing with contempt of court, and it is fair to say that, in this respect, the Act strikes a reasonable balance between the legitimate demands of the Press and the proper administration of justice. The publisher of material which is calculated to prejudice pending proceedings will be allowed to prove that he did not know, and had no reason to suspect, that such proceedings were pending or imminent, and that he took reasonable care to find out the true position.[22] The distributor of publications containing offending matter will also be able to prove that he did not know, and had no reason to suspect, that they contained any offending matter, although he will be liable if he has been negligent.[23] The onus of proof in each case is placed upon the publisher or distributor.[24]

The defence of " innocent dissemination " is a welcome innovation, since the previous law often operated harshly against persons who were free from any blame; it will, however, tend to reduce the courts' control over foreign publications which circulate widely in this country since the publishers will not be amenable to the jurisdiction. The problem is not very great in the case of trials which attract world-wide interest,[25] since the distributor in those circumstances will be under a heavier burden of proving any defence. However, there may be trials which attract little or no publicity in England, but are reported and commented upon in some foreign publication because the facts or some characteristics of the accused are thought to be of interest to readers in that foreign country.[26] Such reports might be highly prejudicial, and yet the distributor

20 There still remains some executive discretion in criminal appeals by virtue of the Criminal Appeal Act, 1907, s. 19. See *R.* v. *Podola* [1960] 1 Q.B. 325.

21 See *The Guardian*, March 15, 1960.

22 s. 11 (1). This alters the law as stated in *R.* v. *Odhams Press* [1957] 1 Q.B. 73, although the respondents in that case would still be guilty of contempt due to their negligence.

23 s. 11 (2).

24 s. 11 (3). The defence must, it is submitted, be established on a balance of probabilities in view of the serious consequences which may follow upon the publication of prejudicial matter, and not merely because the onus is placed upon the defendant.

25 As in *R.* v. *Griffiths* [1957] 2 Q.B. 192.

26 American editors are often very fond of giving undue prominence to news items which they think illustrate the folk-ways of the British!

would have no reason to suspect that the publication contained such material.[27] Something more effective than mere confiscation of the offending publication seems to be required to meet such situations.

Section 12 of the Act clarifies the law relating to the publication of proceedings before a court sitting in private. Henceforth, it will only be contempt to publish information relating to such proceedings where the court is exercising its parental jurisdiction over infants, or persons suffering from mental illness; or in cases involving national security or secret processes, or in cases where the court exercises any statutory or inherent power to prohibit publication.[28] It will also be contempt to publish any order made by a court sitting in private if the court exercises any power to prohibit publication.[29]

The right of appeal in cases of contempt has already been mentioned, but two further comments may be made at this point. It is not altogether clear which court is to hear appeals from orders made by High Court judges sitting at Assizes. The Court of Criminal Appeal has no appellate jurisdiction over cases of contempt.[30] Section 13 (2) (*b*) seems to indicate the Court of Appeal, but that court has no jurisdiction in a criminal cause or matter. Presumably an assize court will be regarded as an "inferior court," in which case the appeal will lie to the Divisional Court.[31] This would be unusual, but more suitable. The other point concerns appeals in cases of contempt in the face of the court. During the debates in the House of Lords it was sought (unsuccessfully) to exclude an appeal in these circumstances,[32] and although one may dislike the idea of a man being imprisoned without a right of appeal, one cannot but sympathise with the feelings of the Lord Chief Justice that an appeal would jeopardise and interfere with the authority and dignity of the courts.

Proceedings for Habeas Corpus

This part of the Act makes fundamental and long-needed reforms in habeas corpus proceedings and, at the same time, raises serious questions of principle in the administration of the criminal law. It is perhaps fair to say that most of the provisions are inspired by the unsuccessful efforts of a certain Mr. Hastings, which occupied the courts for two years and destroyed the cherished legend that "the suppliant could go from judge to judge until he could find one more merciful than his brethren." [33]

[27] Unless he is expected to read every page of every publication—a duty which would be intolerable and which would defeat the objects of the Act.
[28] s. 12 (1). [29] s. 12 (2).
[30] Except when the person punished for contempt can appeal against his sentence under the Criminal Appeal Act, 1907. See s. 13 (6) of the Act.
[31] s. 13 (2) (*a*), which speaks of inferior courts "not referred to in the next following paragraph. . . ."
[32] H.L.Parl.Deb., Vol. 222, cols. 269–271, 278, 280.
[33] *Re Hastings* (*No. 3*) [1959] Ch. 368, 379, *per* Harman J.

The decision of the Divisional Court in *Re Hastings (No. 2)* [34] is confirmed by section 14 (2), which rules out the possibility of a second application for habeas corpus unless fresh evidence is adduced. This subsection also abolishes the right to apply to the Lord Chancellor. An application may be made to a single judge or to a Divisional Court of the Queen's Bench Division, but if a single judge does not feel obliged to grant the application in a criminal case he must refer it to a Divisional Court, which may refuse or grant the application.[35] No appeal lies from an order for the release of the person restrained if it is made by a single judge.[36] But, where the order for release or detention is made by a Divisional Court, either side may appeal to the House of Lords. If the defendant, by reason of the order of the Divisional Court, would be entitled to be released, and the prosecutor appeals to the House of Lords, the defendant will not be affected by the decision of the House of Lords, except in those cases where an order under section 5 (1) is in force.[37] This section enables the Divisional Court to order the defendant to be detained or released on bail, if the prosecutor appeals against an order for his release.[38] Although this provision is not entirely new,[39] its application to habeas corpus proceedings, in addition to a right of appeal by the prosecutor, goes a long way to undermine the fundamental principle of habeas corpus—the right to have the lawfulness of one's detention determined summarily and finally, without the customary delays of litigation.[40] Among the many questions raised by these provisions, only two will be considered here.

If the prosecutor appeals successfully from an order for the defendant's release made by the Court of Appeal or by a Divisional Court (where no order is made under section 5 (1)), the defendant will not be re-detained, so that the question of law is to that extent an academic one. It is a rule of judicial practice that the courts will concern themselves only with live issues, unless a statute provides to the contrary.[41] It is submitted that, on this point, the Act is not very clear. The right of appeal is granted in terms similar to those used in the statutes which regulate appeals in civil cases,[42] and the sections precluding re-detention relate more

[34] [1959] 1 Q.B. 358.

[35] s. 14 (1).

[36] s. 15 (2).

[37] ss. 5 (5), 15 (4).

[38] s. 5 (1). In the case of persons detained under orders made under Part V of the Mental Health Act, 1959, such an order operates as a continuance of the order under that Act, s. 5 (4).

[39] *Cf.* s. 16 (2) of the Criminal Justice Act, 1925, now repealed.

[40] See *Cox* v. *Hakes* (1890) 15 App.Cas. 506, 522, *per* Lord Halsbury.

[41] *Cf. Sun Life Assurance Co. of Canada* v. *Jervis* [1944] A.C. 111. On the court's attitude to academic questions in relation to actions for declarations, see S. A. de Smith, *Judicial Review of Administrative Action* (1959), pp. 391–394.

[42] Appellate Jurisdiction Act, 1876, s. 3 (1); Administration of Justice (Appeals) Act, 1934, s. 1 (1).

to the *consequences* of an appeal than to the conditions therefor. The sections providing for re-detention could not have been inserted to avoid any difficulty caused by this rule of practice, because they do not apply to civil applications. They were clearly inserted for the purpose of reconciling the conflict between the right of personal freedom and the need to have important points of law settled by the House of Lords.

The real cause of the difficulty is the extension of the right of appeal by the prosecutor. Although it is not entirely new, one would expect to find strong reasons for its extension to the field of habeas corpus. If the applicant in civil proceedings is entitled to go free, the same result should follow in criminal proceedings. If there is no appeal from an order for release made by a single judge, why should there be an appeal from a similar order made by three judges? In both cases, the considerations for making the order are the same. There may be reasons, unconnected with the application, for detaining a person in spite of an order for his release, as in the case of persons detained under the Mental Health Act, 1959,[43] or persons who are subject to extradition proceedings. Perhaps it would have been better to limit the application of section 5 to these cases, instead of justifying its general application on the rather dubious ground that nothing has been taken from the subject because he has never had a right of appeal in criminal applications for habeas corpus.[44]

Among the other provisions of the Act, the most important are those relating to proceedings in the High Court by way of certiorari. If the High Court decides that the sentence imposed by the magistrates' court or quarter sessions (on an appeal from the magistrates' court) was beyond the powers of those courts, it may impose a sentence which the magistrates' court had power to impose, instead of quashing the conviction.[45] The High Court has the same power in relation to orders made on conviction, *e.g.*, an order disqualifying a person from holding a driving licence.[46]

The Act does not give full effect to the demands of the various groups which have pressed for reform in recent years, and one cannot say that it has provided a happy solution to some of the conflicts of principle. It is to be hoped that, when the Act is re-read in the light of the courts' decisions thereon, we may feel that we have lost sixpence, but gained a shilling.

B. W. M. Downey.

[43] Applications by persons restrained under Part V of that Act are deemed to be criminal applications: s. 14 (3).

[44] See the argument of the Attorney-General, H.C. Official Report of Standing Committee A, col. 85.

[45] s. 16 (1), overruling *R.* v. *Willesden Justices, ex p. Utley* [1948] 1 K.B. 397, 399.

[46] s. 16 (3). See *R.* v. *Worthing Justices, ex p. W., The Times*, December 20, 1960.

NOTES OF CASES

Mistake Inter Praesentes

In *Ingram* v. *Little* [1] the co-owners of a car advertised it for sale. They were visited by a man calling himself " Hutchinson " to whom they offered to sell it for £717. He began to write a cheque and, when that was refused, falsely stated that he was P. G. M. Hutchinson of Stanstead House, Stanstead Road, Caterham. This was checked in a telephone directory, the cheque was accepted and " Hutchinson " was allowed to take the car which he sold to a dealer, the defendant in this case. When the cheque was dishonoured the plaintiff co-owners brought proceedings for conversion and succeeded before Slade J. This decision was upheld by the Court of Appeal (Sellers and Pearce L.JJ., Devlin L.J. dissenting).

Both Sellers and Pearce L.JJ. were agreed [2] that when a deceiver passes himself off as another " whether by disguise or merely by verbal cosmetics," as Pearce L.J. put it, then there could be operative mistake *inter praesentes*.[3] It will be recalled that in *Phillips* v. *Brooks* [4] Horridge J. had expressed the view that there could not be mistake *inter praesentes* but that this was much criticised. It was suggested by Professor Wade [5] that the decision could be supported because no misrepresentation was made until a contract had been formed. Nothing in the judgment of Horridge J. indicates this " chronological " explanation [6] but it was adopted by Lord Haldane in *Lake* v. *Simmons* [7] and the most significant point in *Ingram* v. *Little* is that the majority follow Lord Haldane and are at pains to indicate that they regard *Phillips* v. *Brooks* as a decision on its special facts.[8] A " chronological " interpretation was excluded in *Ingram* v. *Little* because if there had been a contract prior to the misrepresentation, which Sellers and Pearce L.JJ. doubted, it had been repudiated and discharged by the rogue's refusal to pay cash. From that point the negotiations were directed to the formation of a new and different contract—a credit sale as distinct from a cash transaction.[9]

1 [1960] 3 W.L.R. 504; [1960] 3 All E.R. 332.
2 [1960] 3 W.L.R. at pp. 511 and 517; [1960] 3 All E.R. at pp. 337 and 341.
3 *Cf.* Unger (1955) 18 M.L.R. 259 at p. 266, where operative mistake *inter praesentes* is limited to physical disguise.
4 [1919] 2 K.B. 243.
5 (1922) 38 L.Q.R. 201 at p. 204.
6 See Glanville Williams, 23 Can.B.R. at p. 276, note 11; Anson, *Contract*, 21st ed., p. 264, note 1.
7 [1927] A.C. 487 at pp. 501–502.
8 [1960] 3 W.L.R. at pp. 512, 514 and 520; [1960] 3 All E.R. at pp. 337, 339 and 343.
9 [1960] 3 W.L.R. at pp. 510 (Sellers L.J.) and 518 (Pearce L.J.); [1960] 3 All E.R. at pp. 336 and 342.

It has been pointed out both judicially [10] and academically [11] that Lord Haldane by explaining *Phillips* v. *Brooks* on a ground other than that on which it was expressly decided impliedly disapproved the express ground. Hence it seems that the majority in *Ingram* v. *Little* also in effect disapprove *Phillips* v. *Brooks*, in spite of Sellers L.J. saying that as the case had stood for so long he would not feel justified in saying it was wrong. Furthermore both Sellers and Pearce L.JJ. regarded [12] *Hardman* v. *Booth* [13] as clear authority that there could be mistake of identity *inter praesentes*.

They were also at one on two other points which have been the subject of speculation. They held that it was not necessary that the victim should have had previous personal knowledge of the person whose identity was assumed by the deceiver but such knowledge was important in considering whether identity was " of any moment or whether it is a matter of indifference." [14] Again they appeared to regard a real third party portrayed by the deceiver as essential to mistake of identity [15] thus giving no countenance to those [16] who have defended *Sowler* v. *Potter*.[17]

Pothier makes an inevitable appearance in the judgments and the majority, as might have been expected, do not regard him as a safe guide to the common law position.[18] The importance of this seems to be that it bears on a problem on which there is a conflict of opinion between Dr. Goodhart [19] and Dr. Glanville Williams [20] —must mistake of identity be material or not? The rejection of Pothier, coupled with the fact that the majority cite passages from Dr. Goodhart in which he makes the point that English law is not concerned with motive, tells against materiality. On the other hand, the already cited remarks of Sellers L.J. on the victim's previous knowledge of the person portrayed appear to favour the opposite view, and even stronger support for it can be found in the judgments of Pearce and Devlin L.JJ.

Pearce L.J. contrasts the case of a man passing himself off as a famous portrait painter where mistake of identity would be of vital importance, with the shopkeeper selling in an ordinary

10 Gresson P. in *Fawcett* v. *Star Car Sales* [1960] N.Z.L.R. at p. 414.
11 Williams, 23 Can.B.R. at p. 276, note 11. *Contra* Hallett J. in *Dennant* v. *Skinner* [1948] 2 K.B. 164 at p. 169.
12 [1960] 3 W.L.R. at pp. 514 and 520; [1960] 3 All E.R. at pp. 339 and 343–344.
13 (1863) 1 H. & C. 803.
14 [1960] 3 W.L.R. at pp. 511 and 516–517; [1960] 3 All E.R. at pp. 337 and 341. For a full discussion see 23 Can.B.R. at pp. 282–287.
15 [1960] 3 W.L.R. at pp. 514–515 and 516–517; [1960] 3 All E.R. at pp. 337 and 341.
16 Wilson (1954) 17 M.L.R. 515.
17 [1940] 1 K.B. 271. The remarks in *Ingram* v. *Little* support the main argument in (1955) 18 M.L.R. 259.
18 [1960] 3 W.L.R. at pp. 515 and 515–516; [1960] 3 All E.R. at pp. 339–340 and 340.
19 57 L.Q.R. 228. See also Cheshire (1944) 60 L.Q.R. 184–185.
20 23 Can.B.R. at pp. 386–396.

transaction to someone who misrepresents himself as a well-known figure. In the latter case the identity of the purchaser would not be " of sufficient importance to override physical presence identified by sight and hearing." In the case before the court the name and personality of the " false Hutchinson " were of no importance until payment by cheque was suggested. Thereafter the parties " were concerned with a credit sale in which both parties knew that the identity of the purchaser was of the utmost importance."

Devlin L.J., having referred to Pothier and the illustrations which seem to show that Pothier held a stricter view of mistake than his bare statement of principle would indicate,[21] also instances the case of a portrait painter as one where identity is normally essential, and hence mistake as to it would be operative. In the case before the court he thought that identity, as distinct from credit-worthiness, was not fundamental and so, in his view, there was no operative mistake. He mentioned the rule in frustration that the court imposes the just solution, irrespective of the intentions of the parties and continued:

> " This rule applies in the case of mistake because the reason for the avoidance is the same, namely, that the consent is vitiated by non-agreement about essentials."

It is clear that neither judges [22] nor academic writers [23] are satisfied with the justice (or rather injustice) which results to third parties in cases of mistake. Hence the suggestion may be ventured that since to hold immaterial mistake inoperative would limit the ill-effects of the present rules and would not be unduly harsh upon the mistaken party, a court in the future may well prefer this view.

Devlin L.J. acutely observed that the fact that the rogue gave P. G. M. Hutchinson's address was no proof that he was that man and, even if it had been, that was no proof that the cheque would be met. The answer seems to be that the majority, in addition to requiring knowledge of the existence of P. G. M. Hutchinson, should also have required previous knowledge of a relevant attribute, in this case financial stability.[24]

The learned Lord Justice also pointed out that cases on mistaken identity were treated in textbooks under formation of contract as well as mistake. He regarded *Boulton* v. *Jones* [25] and

21 [1960] 3 W.L.R. at p. 526; [1960] 3 All E.R. at p. 348. See Smith and Thomas (1957) 20 M.L.R. 38.

22 See in *Ingram* v. *Little* Pearce L.J. at [1960] 3 W.L.R. 521; [1960] 3 All E.R. 344; Devlin L.J. at [1960] 3 W.L.R. 531; [1960] 3 All E.R. 351–352.

23 See, *e.g.*, Harvey, *Victims of Fraud*, Chap. 2; Cheshire & Fifoot, *Contract*, 5th ed., pp. 200–202; Grunfeld (1952) 15 M.L.R. 297; Unger (1955) 18 M.L.R. at pp. 260–261.

24 [1960] 3 W.L.R. at p. 526; [1960] 3 All E.R. at p. 348. Williams, 23 Can.B.R. at p. 287, suggests knowledge of at least one attribute in addition to knowledge of bare existence. Pearce L.J. attempted to meet Devlin L.J.'s point, perhaps inadequately, by saying ([1960] 3 W.L.R. at p. 521; [1960] 3 All E.R. at p. 344) that the telephone directory entry " represented an individual of apparent standing and stability."

25 (1857) 2 H. & N. 564.

Cundy v. *Lindsay* [26] as cases of defective formation and pointed out that the word " mistake " was not mentioned in either case. The problem of offer and acceptance was to be answered by asking, with whom did the victim intend to contract? This, he thought, was not a pure question of fact but a question of law and fact which should be handled by means of the presumption that a person intends to contract with the person to whom he is actually addressing the words of contract.[27] This however was not conclusive and one case in which it could be rebutted was where the person addressed was posing only as an agent for then there would be no thought of contracting with him but only with the supposed principal. He thought *Hardman* v. *Booth* illustrated this but refused to inquire whether any other cases of rebuttal could be found because he thought that in the present case the presumption could not be rebutted by showing that the plaintiff would never have dealt with the rogue unless she had believed him to be P. G. M. Hutchinson. Such evidence, in his opinion, only went to prove that she was the victim of fraud and not of mistake.

This seems to give a strangely restrictive interpretation to *Hardman* v. *Booth* for in that case, it will be remembered, the fraudulent clerk was believed to be a partner, that is both a principal and an agent, and so the case seems to be authority for a much wider possibility of rebutting the presumption of intent to contract with the person physically present than Devlin L.J. appears to suggest.[28] It would also seem that the mistake in that case was as to " credit-worthiness " rather than identity in the sense which he applies to these concepts.[29] He also admitted [30] that Lord Haldane's speech in *Lake* v. *Simmons* ran contrary to his view of mistake but satisfied himself by an examination of the other speeches that the view of Lord Haldane did not form part of the *ratio* of the House.

Devlin L.J. concluded [31] by discussing one of the most interesting matters raised in *Ingram* v. *Little*. Pearce L.J. had ended his judgment [32] with an expression of regret that as the court held the contract to be void it could not use its equitable powers to impose terms giving a fairer result and he also said that he thought it would be a welcome reform if car registration books were made documents of title and legal ownership more closely connected with registration. Devlin L.J. dealt more fully with questions of reform. He remarked that fine distinctions are not necessarily a reproach

[26] (1878) 3 App.Cas. 459.
[27] [1960] 3 W.L.R. at p. 525; [1960] 3 All E.R. at p. 347. The majority of the court also thought that there was such a presumption but, of course, were much readier to allow it to be rebutted than Devlin L.J.
[28] See on this point 23 Can.B.R. at pp. 402–404.
[29] See the report of the argument in 9 Jurist (N.S.) 81 comparing marriage and sale.
[30] [1960] 3 W.L.R. at p. 527; [1960] 3 All E.R. at p. 349.
[31] [1960] 3 W.L.R. at p. 531; [1960] 3 All E.R. at pp. 351–352.
[32] [1960] 3 W.L.R. at p. 521; [1960] 3 All E.R. at p. 344.

to the law but it might well be asked whether the rights of parties should depend on the distinctions drawn in mistake of identity cases. He expressed his approval for suggestions that the present law should be replaced by some scheme of apportionment similar to those which had worked so well in tort. He admitted that he was not making any novel suggestion but this judicial support for reform seems the most significant and welcome feature of this outstanding case. There must remain, however, a slight regret that the majority did not analyse more fully the question of the victim's knowledge of the third party portrayed by the deceiver and that Devlin L.J. did not explore the implications of *Hardman* v. *Booth* at greater length.[33]

A. H. Hudson.

Ratification of Acts of a Fraudulent Agent

Bank drafts, drawn by a bank upon itself, are much used in this country in transactions where it is inconvenient to use cash but the creditor wishes for some further assurance of payment other than the debtor's personal cheque. *Commercial Banking Co. of Sydney* v. *Mann* [1] is concerned with their Australian equivalents, known as bank cheques. It is a case, however, in which the confidence displayed by the Privy Council in one of its previous decisions seems, with all respect, to have been misplaced.

M. and R. were partners in a firm, M. & Co., under an agreement by which all the partnership assets belonged to M. On a number of occasions R., purporting to act on behalf of the firm, got the firm's bank to issue bank cheques in the form " Pay W. or bearer." [2] It did not appear from the evidence whether these bank cheques were delivered by the bank to R. or W. or some third person but they were taken by W. to the C. Bank, where he had an account, and there cashed. In due course each of the bank cheques was paid by the firm's bank to the C. Bank against delivery. In fact W. was not a client of the firm and R. had acted fraudulently throughout. M. sued the C. Bank for conversion of the bank cheques, claiming that they became his property from the time of issue, or alternatively, if this were not so, that they had become his property by his subsequent ratification of R.'s acts in obtaining them. The Privy Council held that the action failed. First, as R. had no actual authority to obtain bank cheques except for the proper purposes of the partnership, it followed that they had not become M.'s property on issue. Secondly, the Privy Council held that M. could not claim that the bank cheques had become his property by ratification because, in their opinion, M.

[33] See also Samek 38 Can.B.R. 479.

[1] [1960] 3 W.L.R. 726 (P.C.).

[2] In this country the bank draft would be made payable to order because of the Bank Charter Act, 1844, s. 11.

could not ratify R's act in obtaining the issue of the bank cheques without also ratifying the subsequent dealing with the bank cheques by him and the C. Bank. On both these issues the Privy Council followed the very similar case of *Union Bank of Australia Ltd.* v. *McClintock*.[3]

In that case the plaintiffs appointed M. general manager of a business which they were carrying on as trustees of an estate. M. opened a personal account under the fictitious name of Robert Haynes with the U. Bank. Then, purporting to act on behalf of the plaintiffs, he got the plaintiffs' bank (the A. Bank) to issue to him bank cheques in favour of R. Haynes or bearer. M. paid them into his " Haynes " account at the U. Bank, which collected payment. The plaintiffs' action against the U. Bank for conversion of the bank cheques failed. The Privy Council held, first, that the bank cheques had not become the property of the plaintiffs on their being issued to M. because his obtaining of them was outside his authority as agent.[4] So far the judgment seems entirely consonant with principle. Secondly, it was held that the plaintiffs could not claim that, as M. had purported to act for them when asking for the bank cheques, they could ratify his act and thus make the bank cheques their own. The Privy Council said that the plaintiffs could not ratify M.'s act in obtaining the bank cheques and then disown his paying them into his own account. If they ratified his obtaining of the bank cheques, they also ratified his subsequent dealing with the bank cheques. It is this part of the judgment which, with all respect, seems so unsatisfactory.

It is, of course, well established that ratification must not be partial, *i.e.*, a transaction cannot be ratified in part and repudiated in part, so that ratification of part of a transaction operates as ratification of the whole.[5] Thus in *Cornwal* v. *Wilson*,[6] an agent having purchased goods on behalf of his principal at a price exceeding the limit of his authority, the principal objected to the contract but nevertheless disposed of some of the goods as his own. He was held to have ratified the contract and was bound to pay for all the goods. However, in the case of ratification of one of a series of acts, this will only amount to ratification of all if the whole series of acts amounts to one transaction. It was the opinion of the Privy Council in the *McClintock* case that M.'s obtaining the bank cheques and his subsequent dealing with them amounted to one transaction, but it is difficult to see why this should be so. Suppose that a principal authorises his agent to obtain for him a bank

[3] [1922] 1 A.C. 240 (P.C.).

[4] On their issue the property in the bank cheques remained with the A. Bank: *Higgons* v. *Burton* (1857) 26 L.J.Ex. 342; *Great Western Ry.* v. *London & County Banking Co. Ltd.* [1901] A.C. 414.

[5] 1 Halsbury, 3rd ed., pp. 177–178, para. 416; *Bowstead on Agency*, 12th ed., Art. 30.

[6] (1750) 1 Ves.Sen. 509. See also *Wilson* v. *Poulter* (1724) 2 Str. 859.

cheque and that the agent, having done so, fraudulently misappropriates it. Nobody would suggest here that the agent's two acts in obtaining and then misappropriating the bank cheque amounted to one transaction and that the principal's authority for the act of obtaining covered also the subsequent dealing with the bank cheque. If the obtaining is also initially unauthorised, but is subsequently ratified, why should the two distinct acts of obtaining and subsequent dealing with the bank cheque now be regarded as one transaction?

The Privy Council justified their opinion in the following words:

> " Unless the bank cheques, when obtained, were to be wholly fruitless and idle, it was necessary to pay them into some bank for collection, and although in truth they were passed into [M.'s] own account for a fraudulent object, the proceeds so obtained might have been applied by him to the trustees' use had he been an honest man. It follows that the selection of his own bank account as the means of collecting the cheques *instead of the bank account of the trustees* [7] was rather an incidental irregularity than a fresh departure, and when his action in obtaining each cheque has been covered by the [principal's] subsequent authority . . . the authority covers both his action in obtaining the cheque and his action in collecting the proceeds." [8]

The implication of this passage is that M. was acting irregularly in paying the bank cheques into his own account but that he would have been acting regularly if he had paid them into the trustees' bank account. This seems to show a misconception as to the purpose of bank cheques (or bank drafts). A person (whether acting himself or through an agent) does not obtain bank drafts from his bank merely to pay them into his own bank account. If he does, he is back where he started, and the situation is nonsensical. Thus the Privy Council's justification of their decision falls to the ground.

It is, therefore, respectfully submitted that the English courts should refuse to follow *Union Bank of Australia Ltd.* v. *McClintock* [3] and should, on similar facts, hold that the principal can ratify the fraudulent agent's act in obtaining the bank drafts without thereby being deemed also to have ratified his subsequent dealings with them. It cannot be said that, in so holding, the English courts would be placing an unfair burden on the collecting bank, for in appropriate cases the collecting bank would have the defences of " holder in due course " or section 4 of the Cheques Act, 1957.

Whereas in the *McClintock* case the A. Bank issued the bank cheques to the fraudulent agent, the evidence available in *Commercial Banking Co. of Sydney* v. *Mann* [1] did not show

[7] Italics supplied.
[8] [1922] 1 A.C. at p. 248.

whether the bank cheques were issued to the fraudulent agent, R., or direct to W., who paid them into his bank account. It is submitted that, if an English court were faced with a situation similar to that in the *Mann* case, it would be important for the court to discover to whom the bank drafts were issued. If they were issued to the fraudulent agent, R., then the court should refuse to follow the *McClintock* and *Mann* cases, and should hold that the principal could ratify R.'s act in obtaining them without being deemed also to have ratified R.'s subsequent dealing with them. If, however, they were issued direct to W., then of course there would only be one transaction and the principal would not be able to sue the collecting bank for conversion of the bank drafts, because they would never have been his property. He would have to seek his remedy elsewhere.

J. A. Hornby.

When is a Legco not a Legco?

During the last few years constitutional theorists have reached unprecedented levels of sophistication in discussing problems relating to the meaning of "Parliament" for the purpose of dissecting the legal concept of parliamentary sovereignty. At a less rarefied level the Judicial Committee of the Privy Council was recently called upon, in *Katikiro of Buganda* v. *Attorney-General*,[1] to determine whether the Legislative Council of the Uganda Protectorate as reconstituted in 1957 was still the Legislative Council referred to in the Buganda Agreement, 1955.

The Kingdom of Buganda is one of the four provinces of the Uganda Protectorate. The 1955 Agreement, made between the Governor of Uganda on behalf of the Queen and the Kabaka of Buganda on behalf of the Kabaka, chiefs and people of Buganda, was designed to place the relationship between Britain, the Uganda Protectorate and Buganda on a new footing. It can fairly be said that it formed part of a package deal, from which sprang new rights and obligations of a strictly legal character.[2] Among the obligations imposed by the Agreement on the Katikiro (or Chief Minister) of Buganda was that of submitting to the Governor the names of persons to be appointed as Buganda representatives in the Legislative Council of the Protectorate after those persons had been chosen by indirect election within Buganda in accordance with a procedure prescribed by the Second Schedule to the Agreement. However, in 1957 and 1958 there re-emerged the separatist tendencies which had sparked off the crisis that had led to the

[1] [1960] 3 All E.R. 849; [1961] 1 W.L.R. 119.

[2] The Agreement (*Laws of Uganda*, 1955, p. 383) acquired legal effect by virtue of S.I. 1955, No. 1221, and an order and a proclamation made by the Governor in pursuance thereof (*Laws of Uganda*, 1955, p. 381).

deportation of the Kabaka a few years earlier,[3] and the Kabaka's Government refused to operate the machinery for electing Buganda's representatives for appointment to the Legislative Council.[4] On the face of it this was a clear breach of the 1955 Agreement.[5] And if the resulting dispute could not be resolved by intergovernmental discussions it would have been open to the Governor, in the last resort, to require the Kabaka's Council of Ministers to resign.

But the next move was made by the Baganda. The Katikiro sought a judicial ruling on the question by issuing a plaint in the Uganda High Court claiming declarations to the effect that since the Legislative Council was not the Legislative Council referred to in the Second Schedule to the Agreement he was under no obligation to take the steps laid down for the election of Buganda representative members. His suit was dismissed in the High Court and the decision was affirmed by the Court of Appeal for Eastern Africa and by the Judicial Committee. Before the Judicial Committee the appellant contended that changes made in the composition of the Legislative Council in December 1957 were so fundamental as to constitute it as a different body; and alternatively, that the changes then made were " major " changes which, according to certain statements appearing in the White Paper recording the various recommendations on which the 1955 Agreement was founded,[6] would not be made before 1961. The Judicial Committee had no difficulty in disposing of these contentions. In the first place, the relevant changes introduced in 1957 amounted merely to the substitution of a Speaker (who had no vote) for the Governor (who had an original and a casting vote) as the presiding officer. In no sense could these be regarded as fundamental changes. Nor, indeed, were they " major " changes; but in any event the Agreement contained no ambiguity that would have justified the admission of extrinsic evidence such as the White Paper. Moreover, the Agreement itself purported to impose a moratorium only on major changes in the Constitution of Buganda, not on major changes in the composition of the Legislative Council of the Protectorate.

It is believed that those who were responsible for framing the recommendations set out in the White Paper envisaged that no major change would be made before 1961 either in the Constitution of Buganda or in the Constitution of the Uganda Protectorate, but

3 See (1953) Cmd. 9028; Legum, *Must We Lose Africa?* (1954), pp. 11–125; de Smith in (1955) 26 *Political Quarterly* at pp. 4–8; Low and Pratt, *Buganda and British Overrule, 1900–1955* (1960).

4 See (1958) Cmnd. 451, para. 107; (1959) Cmnd. 780, paras. 105, 106.

5 Under Art. 7 of the Agreement the obligation to proceed with the election of Buganda representative members existed so long as three-fifths of all representative members were Africans and half the total membership of the Legislative Council (including nominated members) was African. These conditions were fulfilled at all times after 1955.

6 (1954) Cmd. 9320.

that such changes as were in fact made in 1957 were to be regarded as being of a minor character.

Students of constitutional law will have noted that the Buganda Agreement differs from the vast majority of agreements entered into by the protecting power with non-European communities in that it gives rise to justiciable issues.[7] Students of the delays of the law may note that the proceedings in the *Katikiro* case commenced in June 1958 and ended in November 1960. Students of African affairs will already have noted with regret that on December 31, 1960, the Great Lukiko of Buganda resolved to terminate the 1955 Agreement and the protection of the Crown, and declared the independence of Buganda. This resolution was vetoed by the Governor and is ineffective in law. The future relationship between the Kingdom of Buganda and the Uganda Protectorate of which it forms a part is at present under examination by a Relationships Commission.

S. A. de Smith.

Companies, Directors and Trade Disputes

The recent Irish case of *The Roundabout, Ltd.* v. *Beirne* [1] raises interesting problems in the law relating to trade disputes. The facts were that a company, the Marian Park Inn Co. Ltd., was involved in a trade dispute with the Irish Union of Vintners', Grocers' and Allied Trades Assistants and licensed premises belonging to the company were picketed by the union. The business was closed and a new company, The Roundabout Ltd., was formed to which the old company leased the premises with an option to purchase. The directors of the new company were three persons named Moran, their accountant and three barmen. The Morans had controlled the old company and they retained control in the new for they were appointed " permanent " directors to continue in office until death, legal disqualification or voluntary retirement, with powers to appoint and remove other directors at their discretion. No resolution was to be valid unless ratified by a majority of the permanent directors.

When the licensed premises were reopened by the new company all work was carried out by the directors, permanent or non-permanent. The barmen-directors were to receive a fixed annual sum as directors' fees which was actually paid to them at irregular intervals and in varying amounts. The union, which had picketed the premises while they had been closed, continued to do so after they had been reopened by the new company, which applied for an injunction to restrain the picketing.

[7] The Baganda attached particular importance to giving legal effect to the Agreement following the revelation made during the hearing of the *Kabaka* case in 1954 (see Low and Pratt, *op. cit.*, p. 342) that the Crown did not consider itself bound in strict law by the terms of the Uganda Agreement, 1900 (which was later substantially superseded by the 1955 Agreement).

[1] [1959] I.R. 423.

Dixon J. remarked that he thought that there was " a considerable element of subterfuge " in the formation of the new company but that did not seem to be the whole aim of the arrangement.[2] He thought that there had been some idea of introducing " new blood " into the running of the premises, even though the Morans retained such complete control.[3] That being so, he held that the new company was an entity distinct from the old, the trade dispute did not continue to attach to the premises in their new occupation, and therefore he granted the injunction for which the plaintiff asked.

In arriving at this decision he had to distinguish the earlier Irish case of *Ferguson* v. *O'Gorman*,[4] where a partnership involved in a trade dispute had sold its premises to a new company, controlled by members of the former firm, which took over the business as a going concern. In that case picketing had been allowed to continue. Dixon J. pointed out that the situation in the earlier case was much as if the firm had been converted into a company but that in the case before him the old company still remained in existence and was in fact lessor to the new. Furthermore the new company had not taken over a going concern. Though Dixon J. thus restrictively interpreted *Ferguson* v. *O'Gorman* on this point, a glance at the table of cases in Citrine, *Trade Union Law*,[5] will show that it remains a most important authority on many other aspects of the law relating to picketing.

The precise implications of Dixon J.'s judgment are a little difficult to assess. The distinction from *Ferguson* v. *O'Gorman* on the ground that no going concern was taken over seems clear enough, but what weight is to be attached to the fact that he thought that " new blood " was to be introduced into the running of the business? Again what would have been the position if the old company had amalgamated with another? There would then have been a much closer resemblance to the conversion of the firm into the company which occurred in *Ferguson* v. *O'Gorman*. However, these questions must for the present remain a matter of speculation.

Dixon J. had a further ground for granting an injunction against the picketing. He thought that the new company had not " employed " anyone and were, therefore, not " employers." [6] Hence there was no trade dispute within the meaning of section 5 of the Trade Disputes Act, 1906.[7] True the new company was a

2 *Ibid.*, at p. 428.
3 *Ibid.*, at p. 427.
4 [1937] I.R. 620.
5 2nd ed., 1960, p. xxvii.
6 [1959] I.R. at p. 429.
7 The relevant words of the section read ". . . the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any

potential employer but that, he held, was not enough to satisfy the requirements of the statute. Although the barmen-directors might appear to be very much in the position of "workmen," nevertheless directors, said the learned judge,

> ". . . cannot be regarded as working in pursuance of any contract of employment, and, therefore cannot be regarded as workmen of the company."

Though this is certainly true so far as directors *qua* directors are concerned,[8] it seems to fail to take account of the fact that directors may simultaneously be servants of their company, as has very recently been shown in the advice of the Privy Council in *Lee* v. *Lee's Air Farming*.[9] Should any ingenious employer be minded to follow the lead given in *The Roundabout, Ltd.* v. *Beirne* it would seem to be no undue distortion of the facts to suggest that men in a position similar to that of the barmen-directors should be regarded as performing their more menial functions in pursuance of an implied contract of service co-existing with their directorship. As this might still be open to evasion by an express disclaimer of intent to create contractual relations [10] it would thus seem that *The Roundabout, Ltd.* v. *Beirne* suggests a point for legislative reform.[11]

A. H. Hudson.

The Phantom Duty

The decision of the House of Lords in *Watson* v. *Winget Ltd.*[1] raises once again the question of the "fifth wheel of the coach" of negligence, the duty of care. The action was raised by a workman who was injured as a result of a latent defect in a machine which his employers had purchased from reputable suppliers. The pursuer alleged that the defenders were negligent in supplying such a defective machine. Unfortunately for the pursuer, the action was not raised against the suppliers of the machine until more than three years after the date when the machine was supplied to his employers, though it was raised within three years from the date of the accident. The defenders argued that the action was barred by section 6 (1) of the Law Reform

person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . ."

8 See Palmer, *Company Law*, 20th ed., pp. 513–514, and cases there cited; Batt, *Master and Servant*, 4th ed., p. 12.

9 [1960] 3 W.L.R. 758; [1960] 3 All E.R. 420.

10 Perhaps the words "employ" and "employment" do not necessarily connote a contract of employment. See *R.* v. *Feldman* (1907) 71 J.P. 269, *per* Lord Alverstone C. J. at p. 270; *Reece* v. *Ministry of Supply* [1945] 1 All E.R. 239; but *cf. Pauley* v. *Kenaldo* [1953] 1 W.L.R. 187; [1953] 1 All E.R. 226.

11 Picketing can perhaps be lawful apart from the 1906 Act. See Citrine, *op. cit.* p. 454.

1 1960 S.L.T. 321.

(Limitation of Actions) Act, 1954, which provides that an action for damages for personal injury in Scotland must be commenced within three years of the " act, neglect or default giving rise to the action." [2] The defenders' submission was that the latest date at which an act, neglect or default could be attributed to them was the date of supplying the machine, and that time had therefore run against the pursuer. This contention was rejected by the Lord Ordinary, accepted unanimously by the Second Division, and rejected by the House of Lords by a majority of three to two.

One of the points which undoubtedly weighed heavily with the majority in the House of Lords was that if the defenders' contention was correct, a person suffering injury might find that time had run against him even before the accident occurred: that would happen if more than three years elapsed between the date when the machine was supplied and the date of the accident. Further, the defenders' argument could not succeed in an English case, where the relevant statutory provisions took the emergence of a cause of action as the *terminus a quo* for the limitation period. In view of these considerations the majority set themselves to discuss an interpretation of the words " act, neglect or default giving rise to the action " which would come to the same as if the Act had provided " from the emergence of the cause of action." In this effort they were successful, and in the process some light was cast on the nature of the manufacturer's duty in a case based on the principle of *Donoghue* v. *Stevenson*.[3]

Lord Reid rejected the contention that there was in such a case a single act, neglect or default, namely, the supplying of the defective article. In actual fact, the negligence for which the defenders might be held liable was negligence by one of their servants in the course of manufacture. The act of supplying the machine itself was not negligent since the defenders did not and could not at the time of supplying the machine know of the existence of a latent defect. No doubt the defenders were in breach of duty in supplying the machine, but their breach of duty began with the negligence in manufacture and continued up to the time of the accident: this was the true meaning of *Donoghue*. Whatever might be the case as regards " act " or " neglect," a " default," that is a breach of duty, must persist after the act or neglect until the damage was suffered. Any other view would be impossible: for negligence consists in the concurrence of a breach of duty and damage—no action could be possible unless the breach of duty still existed when the damage occurred. But if the breach of duty were a single act, how could a person injured two

[2] This provision applies only to Scotland. The equivalent English provisions are contained in s. 2 (1) of the Limitation Act, 1939, as amended by s. 2 (1) of the Law Reform (Limitation of Actions, etc.) Act, 1954: under these provisions the limitation period runs from " the date on which the cause of action accrued."

[3] 1932 S.C.(H.L.) 31.

years or one year after the manufacture and sale of a defective machine recover damages? On the defenders' hypothesis there would in that case be no concurrence of breach of duty and damage, and therefore no action. Lord Reid accordingly held that the defenders' breach of duty continued up to the date of the accident.

Lord Keith considered that the words " act, neglect or default " must refer to the date of the negligence in the legal sense which formed the ground of action: he then set himself the question " what is the date of the negligence? " and answered that it was the date of the accident. The manufacturers were not negligent at the date of supply. There was indeed a careless act during the manufacture. The manufacturers owed a duty to all potential users to take reasonable care to see that the machine was safe: they owed a duty not to injure such users, but till someone was injured there was no breach of that duty. Quoting Lord Wright in *Grant* v. *Australian Knitting Mills* [4] " The duty cannot at the time of manufacture be other than potential or contingent, it can only become vested by the fact of actual use by a particular person." No relationship of duty arises until a potential consumer becomes an actual one and is injured by a breach of the duty. Consequently there was no negligence, no " act, neglect or default " until the date of the accident, from which the limitation period must run.

Lord Denning held that the words " act, neglect or default " were apt to cover all breaches of legal duty, by omission or by commission. What, then, was the breach of duty in a *Donoghue* case? Was it negligence in manufacture, putting a defective machine into circulation or injuring the pursuer? The speeches in *Donoghue* might support any of these possibilities: but the true principle was " You must not injure your neighbour by your fault." No doubt the manufacturer is under a duty to take care in manufacture, but a breach of that duty is not a breach of duty to any particular individual, and it is not that breach of duty which gives rise to an action. There is another duty, Lord Atkin's " You must not injure your neighbour ": this is broken when the neighbour is injured, and it is this breach of duty which gives rise to an action.

It is clear that these judgments were strongly influenced by the feeling that it would be unjust to reject the pursuer's claim. Nevertheless they are an authoritative interpretation of the principle of liability in a case based on *Donoghue*. Lord Reid's method of reaching his conclusion differs rather from that of the other two judges of the majority. Lord Reid held that *after* a negligent act (an act of carelessness) a breach of duty continues until an accident, if one there be, occurs. This approach, however, is open

[4] [1936] A.C. 85.

to the very serious objection, which the minority did not fail to make, that it confuses the act of negligence or carelessness with its consequences. As Lord Simonds pointed out, an act is a thing that is done and then over. It may have consequences, but they are another matter. The manufacturer commits a breach of duty: but it is surely stretching language too far to say that the breach of duty continues. A breach of duty may continue if a person goes on repeatedly or continually committing such a breach: but to speak of a breach of duty continuing in any other sense verges on the metaphysical.

Lords Denning and Keith reached their result by saying that the manufacturers' duty was a duty not to injure. They admitted that the carelessness in manufacture was a breach of duty: but there was no negligence in the legal sense, until a breach of the duty not to injure occurred. On this approach, however, the duty of care ceases to have any legal relevance: the duty is not enforceable, since breach of it is not *per se* actionable. The duty that is legally relevant is the duty not to injure your neighbour by careless conduct.

Either approach leads to exactly the same result as would have followed if the duty of care had not been considered and *culpa* alone looked to. Lord Denning indeed recognises this, by quoting Buckland, *Some Reflections on Jurisprudence*, to the effect that "The breach of duty is the wrongful infliction of damage—*damnum injuria datum*."

It is true that the question of statutory interpretation may have influenced the line taken in the judgments: nevertheless, the result of the case is that the date of negligence is the date of a wrongful injury, not the date of a careless act. If the two dates are different, it is hard to see exactly in what sense the occurrence of the accident can be said to be a breach of duty, or in what sense a breach of duty can be said to "continue" until the accident. These considerations emphasise some of the difficulties of the doctrine of the duty to take care. That doctrine may indeed be a useful way of speaking when one is investigating the question whether a certain person has a title to sue. If the true situation is that A is liable to B if A causes injury by a careless act which A can reasonably foresee will he likely to injure B, then one can say that A is under a duty to B. Since not all careless acts from which injury can reasonably be foreseen do result in liability, it is necessary to have some way of defining the persons who are entitled to recover damages. This can be done by using the expression "duty of care." This duty, however, becomes an embarrassment when any question other than that of title to sue is being considered: and the House of Lords in *Watson* v. *Winget Ltd.* have quite properly overlooked it, and concentrated upon wrongful injury.

J. T. Cameron.

The Impatient Vendor

Have all the cases on estate agents' commission been superseded by *Drewery* v. *Ware-Lane*? [1] Have estate agents now discovered the perfect formula for obtaining commission at the earliest possible stage, sale or no sale?

Negotiations between an interested purchaser and the vendor were carried on through the estate agents. Then the vendor called at the estate agents' office and indicated that he was prepared to accept an offer of £2,160 for his leasehold house in West Sidcup. Thereupon the estate agents produced, and the vendor signed, two documents: a " letter of authority " and a " vendor's agreement."

The " letter of authority " was a contract between the vendor and the estate agents, commencing " I instruct and authorise you to offer the above property for sale. . . ." The material clause ran:

> " I agree to pay you commission at the rate laid down by the various professional institutes [2] . . . if and when (a) a prospective purchaser signs your ' purchaser's agreement ' and (b) I sign your ' vendor's agreement ' (receipt of a copy of a form of each of the above agreements is hereby acknowledged)."

The " vendor's agreement " was a document whereby the vendor agreed to sell the house to the named purchaser at the price of £2,160, subject to contract. The effect of the words " subject to contract " is, of course, well known to lawyers and estate agents: they rob the " agreement " of any binding force and reduce it to a mere statement of intention.[3]

On the same day the named purchaser signed the agents' " purchaser's agreement " whereby he agreed to buy the house for £2,160, subject to contract.

Thereafter there was some delay on the purchaser's part: he was negotiating to buy the freehold and held up his application for a necessary mortgage until he had arranged to buy the freehold or had given up the attempt. Meanwhile, the vendor became impatient, and nine days after the vendor's and purchaser's agreements had been signed he wrote to the estate agents telling them that, as no further progress had been made with the sale, he felt it was in his own interests to make other arrangements, and had accordingly sold the house to another person. That was the end of the matter so far as the original purchaser was concerned, though he gave evidence, which was not disputed, that he had been prepared to go on, and would have gone on had the vendor not put an end to negotiations.

The estate agents sued the vendor for their commission, and

[1] [1960] 1 W.L.R. 1204; [1960] 3 All E.R. 529 (C.A.) (Ormerod, Willmer and Upjohn L.JJ.).

[2] Details of the rate were set out.

[3] *Coope* v. *Ridout* [1921] 1 Ch. 291 (C.A.).

succeeded. The main argument for the defence was that the terms of the " letter of authority " were not clear and unequivocal,[4] for it spoke of a " prospective purchaser " signing the " purchaser's agreement." Counsel submitted that " prospective purchaser " must mean more than " a person who signs the ' purchaser's agreement ' ", and that it must mean a person who is ready to purchase, who is willing to purchase, and who has the necessary financial means to carry the purchase into effect. This argument was rejected by a unanimous Court of Appeal. " It appears to me," said Ormerod L.J., " . . . that the word ' prospective ' does not connote necessarily either the term ' ready ' or ' willing ' or ' able '; it means a man who has the question of buying this property in prospect or in contemplation and is prepared to make an offer with regard to it. This means that there must be a bona fide prospect, . . . [but] it would be for the defendant to prove . . . that the offer was not a bona fide offer."

The estate agents were able to show that both conditions specified in the " letter of authority " had been fulfilled—that the vendor had signed their " vendor's agreement " and that a prospective purchaser had signed their " purchaser's agreement "—and accordingly, on the only possible construction of the " letter of authority," the commission was payable.

Ormerod L.J. could not end his judgment without a word of warning:

> " It may very well be that it is undesirable that agreements of this kind should be signed by prospective vendors and it may be wise for a prospective vendor to examine with very great care an agreement which he signs in these circumstances. That is not a matter for this court."

In view of the argument in the instant case, it is true that the court could only consider the proper construction of the agreement put before it. Moreover, the vendor may have forfeited judicial sympathy by his hasty repudiation of the prospective purchaser's continuing offer to buy, though in the reasoning of the court nothing turned on this fact. In a future case, it seems that commission will be payable even if it is the purchaser who backs out before exchange of contracts, unless the vendor can show that the offer contained in the " purchaser's agreement " was not made in good faith.

It is suggested that the way is not yet closed for a frontal assault, in an appropriate case, on a special contract for payment

[4] A reference to *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108, 129, *per* Lord Russell of Killowen: " It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

of commission put forward by an estate agent.[5] A close examination of the facts, showing how the vendor came to agree to the estate agents' terms, might, in some cases, show a positive misrepresentation by an agent that these were the "usual terms." Even without any misrepresentation, it may not be far-fetched to argue that the relationship between an estate agent and his client is, like other relationships between professional advisers and their clients or patients, of a confidential or fiduciary nature, so that when a contract between the parties gives the professional adviser an unusual advantage there is raised a presumption of undue influence [6] or an obligation to disclose all material facts,[7] of which the usual practice of the profession is one.

Aubrey L. Diamond.

A Right to Wages during Sickness

In *Orman* v. *Saville Sportswear* [1] Pilcher J. clarified the law relating to the right of the employee to wages during his absence due to sickness.

The plaintiff was employed by the defendants as manager of their skirt factory at a salary of £30 plus a considerable bonus bringing his weekly payment up to about £50. During his absence through illness the defendants paid him his salary, but not his bonus. Pilcher J. decided that his wages were intended to include his bonus, but before he could recover the unpaid bonus the plaintiff had to prove that he was entitled to his wages during his illness. The defendants claimed that he had been paid his salary as an act of grace. There were no express terms in the contract on this point, nor could any be implied, as it was quite clear that the parties would not have been in agreement on this point if they had considered it when the contract was made. This, then, was the first case in which it was essential to decide whether or not there is a common law right to wages during sickness. In previous cases either there was an express or implied term in the contract covering payment or it was not the actual point in issue.

In *Marrison* v. *Bell* [2] the question for the court was whether the employer was entitled to withhold wages from an employee who was receiving benefits under the National Health Insurance Act. It was decided that he was not, Scott L.J. adding his belief that the employee had a common law right to wages during his illness in the absence of any term to the contrary.

5 For the reasons for my view that it is desirable that the public be protected against such contracts, see (1959) 22 M.L.R. at pp. 690–691.

6 Cheshire and Fifoot, *The Law of Contract*, 5th ed., p. 248, say: " . . . equity has not closed the list of persons against whom the presumption is raised. There are certain special relations where undue influence is invariably presumed, but they do not cover all the possible cases. . . ."

7 See *Tate* v. *Williamson* (1866) L.R. 2 Ch.App. 55.

1 [1960] 3 All E.R. 105; [1960] 1 W.L.R. 1055.

2 [1939] 2 K.B. 187; [1939] 1 All E.R. 745.

In *Petrie* v. *Mac Fisheries* [3] not only was there a notice displayed in the works detailing the arrangements for payment during sickness (the plaintiff said that he had not seen it) but the plaintiff had received payments in accordance with these arrangements during previous illnesses. So there was no need to consider the common law right. However, Pilcher J. quoted from the judgment of du Parcq L.J. in this case: " . . . if one has a weekly hiring of a servant, without more, and with nothing in the terms of it, whether they are expressed or implied, to suggest that during temporary absence through illness he is not to be paid, then one may assume that he is to be paid, and that it was the intention of the parties that he should be paid." [4] Again in *O'Grady* v. *Saper* [5] the point was not in issue as previously the employee had not been paid and he did not expect to be paid this time.

Pilcher J. exhaustively considered these previous cases and having considered all the various dicta he came to the conclusion that

> " Where the written terms of the contract of service are silent as to what is to happen to the employee's right to be paid whilst he is absent from work due to sickness, the employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and evidence in the case. If the employer seeks to establish an implied condition that no wages are payable, it is for him to make it out, and the court in construing the written contract will not accept any implied term which will not pass the test laid down by Scrutton L.J. in *Reigate* v. *Union Manufacturing Co.*[6] " [7]

In *Orman* v. *Saville Sportswear* Pilcher J. was unable to imply a term in the contract relating to the payment of wages during the illness of the plaintiff as it was impossible to determine what the parties would have agreed had they considered the point when they were making the contract. The plaintiff said that he expected full payment while he was absent during sickness, whereas the defendants said that they would have insisted on payment for a period of up to one week only. As there was no term in the contract the plaintiff was entitled to his wages.

This is a most welcome decision. There can be no more doubts as to the existence of a common law right to wages during an absence from work due to sickness. Perhaps the headnote writer in *Marrison* v. *Bell* could now consider himself vindicated? Certainly the dicta in the cases following *Marrison* v. *Bell* doubting the existence of the right can now be disregarded.

Olga L. Aikin.

[3] [1940] 1 K.B. 264; [1939] 4 All E.R. 285.
[4] [1940] 1 K.B. at p. 265; [1939] 4 All E.R. at p. 287. Quoted in [1960] 3 All E.R. at pp. 109–110.
[5] [1940] 2 K.B. 469; [1940] 3 All E.R. 527.
[6] [1918] 1 K.B. 592.
[7] [1960] 3 All E.R. at p. 111.

Picketing and the Peace

The area of lawful picketing is surrounded by a veritable barbed-wire entanglement of crimes and torts. Effective picketing depends at least as much on the sensible administration of the law as on the positive provisions of section 2 of the Trade Disputes Act, 1906, and, in these days, a picketing case is seldom found at High Court level. Rarity, therefore, compounds the legal interest of *Piddington* v. *Bates*.[1]

The scene of the action was the premises of the Free Press, Ltd., a small concern apparently employing non-union labour. In the big printing dispute of 1959, its personnel stayed at their work. While eight of them were on the premises, two vehicles containing eighteen men drew up, most of them wearing picket badges. Two stationed themselves at the smaller front entrance, six feet wide, and four at the rear entrance, which was eleven feet wide. The others patrolled the two streets.

The police were also on the spot, and the respondent constable told the pickets at the rear entrance that two were enough: so two moved away. The appellant approached to reinforce the rear picket. The respondent told him repeatedly that two were enough. The appellant retorted: " I know my rights. I can stand by the gate if I want to. I'm going to join them. If you don't want me to you'd better arrest me." [2] The appellant then " pushed gently past the respondent and was gently arrested." [3] There had been no obstruction of the highway, no disorder, no violence actual or threatened. The appellant was convicted by the magistrates of obstructing a police constable in the execution of his duty, contrary to the Prevention of Crimes Amendment Act, 1885, s. 2.

The question the Divisional Court had to consider on appeal was whether the constable had in fact been executing his duty when the appellant obstructed him. The duty alleged was that of keeping the peace. On this Lord Parker C.J., in the key passage of his judgment, said:

> " The law is reasonably plain. First, the mere statement by a constable that he did anticipate that there might be a breach of the peace is clearly not enough. There must exist proved facts from which a constable could reasonably have anticipated such a breach. Secondly, it is not enough that his contemplation is that there is a remote possibility but there must be a real possibility of a breach of the peace. Accordingly, in every case it becomes a question whether, on the particular facts, there were reasonable grounds on which a constable charged with this duty reasonably anticipated that a breach of the peace might occur." [4]

[1] *Piddington* v. *Bates*; *Robson and Another* v. *Ribton-Turner* [1960] 3 All E.R. 660; [1961] 1 W.L.R. 162.
[2] [1960] 3 All E.R. at p. 661.
[3] *Ibid.*
[4] At p. 663.

Unfortunately, the evidence on which the magistrates held the police constable to be justified in reasonably anticipating a breach of the peace unless he thinned out the picket line is not given in the report of the case. It is, therefore, unclear whether the breach of the peace lay latent in the fact that the total number of pickets who turned up was unreasonable in relation to the nature of the premises and number of persons thereon with whom the dispute existed,[5] or, also, in the bad feeling between the employees at work and the striker pickets engendered by the apparent attitude towards unions of the employing company.

On the argument that it was arbitrary of the constable to stipulate two pickets only for the two different entrances, the court observed that " a police officer charged with the duty of preserving the Queen's peace must be left to take such steps as, on the evidence before him, he thinks proper." [6] It is a discretionary power that must be exercised reasonably and in good faith.

C. Grunfeld.

Options to Renew Leases

The complicated facts of *Weg Motors, Ltd.* v. *Hales and Others* [1] raised a number of interesting legal points. On July 26, 1938, the lessors granted a lease for a term of twenty-one years commencing on December 25, 1938, to the plaintiff company. At this time the land was subject to a charge by way of legal mortgage to an insurance company. Under the terms of the mortgage the statutory powers of leasing could not be exercised by the borrowers, the lessors, without the written consent of the mortgagee except for a term for a period of up to twenty-one years.

A further agreement was made between the lessor and lessee at the same time as the original lease, though it was executed before that instrument. This gave the lessees the option to renew their lease for a further period of twenty-one years at the same annual rental provided they gave written notice to the lessors before December 25, 1959. Notice of this option was registered on January 5, 1939.

By 1959 the freehold had twice been transferred and was then vested in a friendly society whose trustees were the first three defendants. In addition a leasehold interest for a term of one hundred and fifty years had been created in favour of the fourth defendants, who after the commencement of the action transferred the leasehold interest to the fifth defendants.

The insurance company's charge had been transferred from the freehold to the term of one hundred and fifty years and all moneys

[5] *Cf.* the Irish case of *Brendan Dunne Ltd.* v. *Fitzpatrick* [1958] I.R. 29 at p. 44.
[6] [1960] 3 All E.R. at p. 663.
[1] [1960] 3 All E.R. 762; [1960] 3 W.L.R. 964.

due to the insurance company were paid off by the time the case came on for trial.

The facts gave rise to three legal problems. First, was there a properly created option for the renewal of the lease? Secondly, was the agreement rendered void by section 149 (3) of the Law of Property Act, 1925? Thirdly, did the obligation to grant the further lease run with the reversion under section 142 of the Law of Property Act?

The first question was most important since unless the option was a covenant for the renewal of a lease it would be invalid by reason of the rule against perpetuities. It will be remembered that the agreement was dated July 26, 1938, and the option could be exercised by notice in writing any time before December 25, 1959, *i.e.*, the interest was contingent on an event, the giving of notice, which might happen a few months after twenty-one years.

It is well established that an option to purchase an interest in land is subject to the perpetuity rule,[2] but there is an equally well-established exception to this rule in the case of options to renew leases.[3] This exception probably goes back before the rule itself and is well accepted nowadays within its own narrow confines. The question before Danckwerts J. was whether the option available to Weg Motors, Ltd., came within these narrow confines.

It was argued that the option really amounted to a provision to grant a new lease after the expiry of the original term. In support of this it was pointed out that the option agreement referred to " a further lease of the premises " and the option was exercisable by notice given at any time before December 25, 1959. Although the limits of the time available for notice coincided with the length of the term, it was argued that the option was independent of the term since it might be exercised even though the term itself could be determined at the end of seven or fourteen years by a condition of re-entry. Danckwerts J. rejected this argument,[4] holding that by implication the intention of the parties was that the option was only exercisable during the continuation of the relationship of landlord and tenant. He also rejected a further argument based on the fact that the option was conferred by a document separate from the lease and executed apparently before the lease was executed. He held on a true construction the option agreement and the lease were part of one transaction, indeed the option agreement described the respective parties as " the lessors " and " the lessees."

The second problem was whether the option agreement was

2 *London & S.W. Ry. Co.* v. *Gomm* (1881) 20 Ch.D. 562; *Woodall* v. *Clifton* [1905] 2 Ch. 257; *Rider* v. *Ford* [1923] 1 Ch. 541; and see Morris & Leach, *The Rule against Perpetuities*, pp. 212–220.

3 See, *e.g.*, *Ross* v. *Worsop* (1740) 1 Bro.P.C. 281; *Moore* v. *Clench* (1875) 1 Ch.D. 447; *Re Tyrrell's Estate* [1907] 1 I.R. 194, and cases cited *supra*, note 2. See also *Morris & Leach*, p. 216, esp. note 5.

4 [1960] 3 All E.R. 762 at p. 769.

invalid by section 149 (3) of the Law of Property Act, 1925, which provides that a term of years limited to take effect more than twenty-one years after the instrument purporting to create it is void and so also is any contract to create such a term. On the authority of the decision of Buckley J. in *Re Strand and Savoy Properties*,[5] Danckwerts J. held that this did not invalidate contracts whereby an instrument creating a lease would be made more than twenty-one years after the contract *provided the lease itself was to take effect within twenty-one years of the instrument creating it*. The section was worded so as to invalidate reversionary leases and contracts to create reversionary leases, but did not invalidate a contractual option under which no lease, reversionary or otherwise was created. In fact the option agreement merely creates an offer which remains irrevocable for the period of the original term.

Having decided that the option agreement was validly created and binding on the original lessors the third problem which Danckwerts J. had to decide was whether it ran with the reversion so as to bind the assignees and successors in title of the original lessors and persons claiming under them.

The option had been effectively registered on the freehold title under the Land Registration Act, 1925, so the plaintiffs were adequately protected, but it was contended that (i) the option was not " a covenant entered into " within the meaning of section 142 (1) of the Law of Property Act; (ii) that the obligation did not have reference to the subject-matter of the lease; and (iii) that the original lessors had no power to bind the reversionary interest because of the mortgage agreement.

Under the terms of section 142 (1):

> " The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lease has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate. . . ."

Really there can be little doubt that the option agreement was a " covenant," although not under seal. The expression " covenant " normally refers to stipulations under seal but there is an abundance of evidence to show that its use is not exclusively so.[6] Nor could it be argued that the option agreement was collateral to the lease since it had already been decided that the option agreement and the lease were essentially one transaction.

[5] [1960] Ch. 582. See also (1960) 24 *Conveyancer* (N.S.) 462.

[6] See Norton, *A Treatise on Deeds*, 2nd ed., Chap. 28, esp. p. 531. *Doe* d. *Henniker* v. *Watt* (1828) 8 B. & C. 308; *Hayne* v. *Cummings* (1864) 16 C.B.(N.S.) 421 at pp. 426, 427; *Muller* v. *Trafford* [1901] 1 Ch. 54 at p. 61; *Cole* v. *Kelly* [1920] 2 K.B. 106 were cited by Danckwerts J. To hold otherwise would exclude the operation of s. 142 (1) from all leases other than those created under seal.

The argument that the option agreement did not have "reference" to the subject-matter of the lease or, as older property lawyers say, did not "touch and concern the land" was soon dismissed. The weight of authority is entirely against it.[7]

Finally, the effect of the mortgage agreement of July 1937 was relied on and it was argued that it left the lessors no power to bind the reversionary estate immediately expectant on the term granted by the lease and so prevented the obligation running with the reversion. But the original lessors were solely entitled to the freehold at the time of the granting of the option and their reversionary estate was the only one existing at that time. It could be argued with some force that the written consent of the insurance company, the mortgagees, was necessary before they personally could be held bound by the option but in so far as the lessors owned the fee simple a grant under the powers of the fee simple owner must be effective against anyone other than the mortgagee and persons claiming through the mortgagee. Any rights that the insurance company had of upsetting the option must have disappeared when all the moneys due to them were paid off.[8]

J. A. Andrews.

[7] *Richardson* v. *Sydenham* (1703) 2 Vern. 447; *Simpson* v. *Clayton* (1838) 4 Bing.N.C. 758 at p. 780; *Muller* v. *Trafford* [1901] 1 Ch. 54 at p. 60. Counsel for the defendants might be forgiven for taking a point against which there was so much authority. It is difficult to see how a covenant to renew a lease can really be said to "touch and concern" the land or to affect the landlord *qua* landlord or the tenant *qua* tenant. Megarry and Wade regard it as anomalous: *The Law of Real Property*, 2nd ed., p. 702.

[8] The plaintiff company's solicitor had written to the mortgagees twice in April and June 1959. The first letter asked them if they were agreeable to the granting of the second term of twenty-one years. The mortgagees replied that they did not think their consent was necessary for a term of any period up to twenty-one years. Their reply to a second letter explaining the position more fully was that they had nothing more to add. Danckwerts J. thought there was much to be said for the view that this in itself amounted to due written consent, but it was unnecessary to decide the point.

REVIEWS

THE PROBLEM OF DELINQUENCY. Edited by SHELDON GLUECK [Boston (Mass.): Houghton Mifflin Company; Oxford: at the University Press. 1959. xvi and 1183 pp. (with index). £8 net.]

THIS very substantial volume falls into the category of the American publications known as "case books," that is to say it contains material designed for study by law students, and indeed particularly by Professor Glueck's own advanced Seminar at Harvard on the Problem of Delinquency. With its large two-column pages it certainly provides them with a formidable task, and gives to the general reader who has the leisure and interest to embark upon a serious study of the subject a most valuable and detailed conspectus. Most of the material, especially Part II, which is concerned with the juvenile court in the U.S.A. (largely court decisions) is strictly American in its factual, and indeed its psychological, approach, and to that extent the English reader may feel a little at sea. On the other hand the problems of methodology and causation which are handled in Part I, treatment (Part III) and prevention (Part IV) are broadly similar in modern communities, so that with a little adjustment the English reader should be able to extract much meat from the book, which considering its contents is cheap at three pounds.

It should be made clear in the first place that in the U.S.A. the term delinquency means juvenile delinquency: in this country it has been generally used with a wider meaning to cover criminality as a whole, a usage which has led to some confusion, and has no doubt been a factor in the recent change in the name of the leading British periodical on the subject from *British Journal of Delinquency* to *British Journal of Criminology*.

Apart from the legal decisions in the Juvenile Court section the material is confined almost entirely to extracts from learned journals and addresses delivered at conferences. Indeed Professor Glueck states in his preface that extracts from books have been limited to the works of the Gluecks themselves. This is not quite true, because one of the very rare English sections is from Goring's *English Convict*. This means that the English reader has placed readily at his disposal a mass of material which he probably could not obtain without visiting an American library.

The essential point is: How well has the selection been made? On the whole I think one can say it is satisfactory, as indeed one would expect from an editor of Professor Glueck's authority and reputation. Some qualifications must be made however. The first is that he has drawn too little on non-American sources. In spite of the fact that he emphasises in his Introduction that he has drawn on foreign sources I have only been able to find one modern English extract—that of Messrs. Spencer and Grygier on the Probation Hostel —and, apart from a page or two from Lombroso, the writings of other European criminologists seem to be equally neglected. It is true that here and there in the footnotes there are references to the work of Sir Cyril Burt, to the *British Journal of Delinquency* and other authorities, but the reader of this volume who had no other sources of information would inevitably draw the conclusion that little work on the subject with which it deals had been done in Europe, particularly of recent years. The truth is of course just the opposite: there are flourishing schools of criminology in several British universities and the work of the Institute for the Study and Treatment of Delinquency with its *British Journal of Delinquency* is well known abroad.

It is true that there has not been quite the same concentration on juvenile crime in Europe as has been evident in the U.S.A.[1] but much of value has appeared. Indeed one might widen the area of criticism, because these problems are under helpful study in other parts not only of the British Commonwealth, but of the world in general. American lawyers are usually so sensitive to the decisions of British courts, and so generous in their use of them, that the omissions in this book strike one the more forcibly. The truth probably is that with a few exceptions, such as Charles Goring himself, the British contribution to the scientific study of delinquency problems has until the present generation been so slight that the Americans who have been far ahead of us both in penal experiments and on the theoretical side have no doubt got out of the habit of looking to this country as a source of inspiration. But this failure in criminological study did not occur all over Europe: indeed valuable work has been done, particularly in Holland and Scandinavia and in pre-Hitler Germany, so that the same excuse would not be valid in respect of the lack of European material generally.

I think too that there is some unevenness in the balance of the selection. There have of course been very marked divergencies of opinion among the different schools of American criminologists and some of the exchanges have been heated and even bitter. This has been particularly evident as between sociologists and psychologists. Professor Glueck who is exceptional among leading criminologists in being a lawyer should better than anyone be able to hold the balance, and up to a point he does so. Indeed in his Preface he stresses the importance of including "all relevant points of view."

On the whole however Professor Glueck has been on the side of the psychologists as against the sociological school: it is perhaps significant that among others the present volume is dedicated to Dr. William Healy and Dr. Augusta Brunner. In several of his introductory notes to chapters in this volume he criticises the sociological school of criminologists unmercifully. He has accepted the view that the disorientation which shows up in criminal courts in the delinquent's later years usually, if not invariably, has its origin in his early life. His famous study "Unraveling Juvenile Delinquency" with its "prediction" technique is founded upon his belief in these theories, and has been sharply attacked in consequence.

Personally as far as my own slight experience goes I believe Professor Glueck to be right, but I feel that the present volume is perhaps somewhat overweighted with contributions by his own followers, and that the work of some outstanding American criminologists is hardly included at all. Having said this I would emphasise that it is more a matter of balance than of exclusion, and that Professor Glueck's claim that he has included something to give an idea of all the significant points of view is made out.

I have said that this volume is concerned with Juvenile Delinquency. Part I which deals with methodology and also with causation is however of wider import, and relevant to the study of criminology as a whole. The exceptional difficulties which beset the scientific study of the subject particularly on the statistical side are well brought out: these matters have of course attracted a great deal of attention in England of recent years. As to causation Professor Glueck is a leading proponent of the multiple causation theory, and the extracts given strongly support his views which have met with a large measure of acceptance in England of late years. Some of the contributions given here date somewhat: thus there is in some of them a preoccupation with unemployment which subsequent events have shown to be unjustified: it would have been wise at the least to have footnoted these sections in the light of later experience.

While Part I takes up some 250 pages of text, Part II on the Juvenile

[1] In a footnote at p. 79 a recent American bibliography of no less than 972 articles dealing with juvenile delinquency is referred to!

Courts is given no less than 350 pages and as has already been pointed out many court decisions are here included. Although they are stated to be concerned with basic legal issues many of them are technical in character, a fact no doubt explained by Professor Glueck's objective to provide a case book for law students, but a weakness for the point of view of the general reader. Part III which deals with Treatment is, as one would expect, the longest section of the work. The shortish section on Probation I found of especial interest: the Americans were the originators of this sort of work, which goes back in a rudimentary way to "John Augustus, a Boston shoemaker, today recognised as the first probation officer"—he was working from 1841 to 1858. There is also here a significant chapter on "Punishment or Treatment of Parents" which contains material which might well receive attention in England. The comparatively short Part IV (some 140 pages) contains a chapter on the Gluecks' own special subject "prediction" which has been a good deal discussed here by Mr. George Benson of the Howard League and others. The preventive work of some of the American Youth Schools and other institutions is of great interest and gives much promise for the future. There is of course a parallel movement here, though their financial strength and manpower enable the Americans to go ahead faster than we can do. Professor Glueck's view would be that these institutions are of limited value, however, as the pattern of juvenile delinquency has in most cases already been formed in the home long before the boy is ready to enter the Youth Club or to join the gang to lure him from which the Youth Club has been formed.

C.

Law and Policy. The W. M. Martin Lectures, 1957. By J. A. Corry, LL.B., B.C.L., LL.D., Hardy Professor of Political Science in the Queen's University, Kingston, Ontario. [Toronto: Clarke, Irwin & Co., Ltd. Stocked and distributed in London by Stevens & Sons Ltd., on behalf of the publishers. 1959. v and 71 and (notes) 6 pp. £1 5s. net.]

This book is the text (with added notes) of three lectures delivered as the W. M. Martin Lectures of 1957 in the University of Saskatchewan. The objects of the foundation of these lectures, we are told, are the encouragement of sound scholarship in the College of Law and the continued maintenance of government under the rule of law in Canada, and the topic of "Law and Policy" is clearly one which can satisfy both requirements.

The underlying thesis of these lectures is this. At the end of the last century we were very complacent about our law. We thought we had a legal system of unsurpassed excellence, and the body of the law, "free from the pressures of vagrant policies," could provide an answer to all questions arising under a changing society. Today we know that law is not something standing aloof from society. Law is itself a product of society, and law must therefore always change with changing society. But if law is to change then the lawyers responsible for securing these changes must have a conscious policy. Though law is often contrasted with policy—the former consisting of rules regulating conduct with a fair degree of certainty, whereas policy is largely uncertain and unpredictable—yet the possession of some conscious policy by the judges is essential if the courts are to help in shaping the new society which economic and other changes are bringing about.

One may question the author's assertion that at the end of the last century we were complacent about our law. A complacent satisfaction with the law and the legal system may have been characteristic of the age of Blackstone, but a hundred years later legal thinkers were in no way disposed to assume

that the reforms of the Victorian age had ushered in the perfect system of administering the perfect law. Writers like Pollock and Maitland—and even the conservative Maine—as well as judges like Bowen and Bramwell and Willes, all recognised that the function of a court of justice was to work out the process of adapting the law to the new ideas and new interests which society was continually generating.

However, as the lectures proceed we discover that Professor Corry's generalisation about the complacency of the late Victorians is crystallised into the thesis that they were so wedded to the principles of *laissez-faire* that they were satisfied with a legal system which limited its activities to securing the minimum restraints necessary to secure public order. *Laissez-faire* has gone. Under dictatorships it has given place to state control. In the democracies it has made way for a system under which a considerable measure of economic freedom is disciplined, partly by governmental action and partly by law.

Governmental action is exhibited through legislation and administrative decision. Action by the law is exhibited through judicial decision, and though it is usually held that judges are not concerned with the policy objectives of the law, in fact we know—and can prove—that judges are quite expert at moulding the law to further a particular policy. Furthermore, Professor Corry insists that it is desirable that the judges should make haste to do this moulding. Development in law is bound to take place, and if it does not take place through judicial channels it will have to be brought about by legislation. But legislation is always a clumsy instrument of change, for it is never as well knitted into the fabric of the law as is judge-made law.

F. H. Newark.

Rivers in International Law. By F. J. Berber. [London: Stevens & Sons, Ltd. 1959. xi and 296 pp. £2 5s. net.]

The conclusion which Professor Berber comes to is that there are no ascertainable rules of international law applicable to international rivers, nor for that matter is there any standard practice with regard to the problems which arise. Further to this he suggests that the absence of strict rules is probably an advantage in view of the variety of factors affecting different rivers in different political, economic and climatic situations. Finally he believes that the treaty is still a better solution than a judicial decision as an agreement represents a higher form of integration than an authoritarian decision of a third party (pp. 270–274).

It may be doubted whether there is any great justification for spending some 250 pages of analysis in order to reach such negative conclusions. Obviously in certain contexts the expenditure of time might be justifiable, but the present reviewer is forced to admit to certain doubts of the value of Professor Berber's treatment of the subject.

The first fifty pages are largely taken up with a sifting of existing academic opinion. This is done by quoting at length from some forty authorities. The quotations are punctuated by Professor Berber's own phrases which serve merely to announce the source of the next quotation. This method of introducing the subject is most irritating. The quotations add little to the work and the whole could have been condensed more properly into footnotes to Professor Berber's own text.

The next hundred pages are devoted to a discussion of water treaties. We are told who has treaties with whom and then we are subjected to a further barrage of quotation from these treaties. At this point the reviewer was almost tempted into looking on the work as a source book rather than a textbook. Unfortunately the quotations from each treaty were so fragmentary as to be of doubtful value.

Existing case law is dealt with in eight pages and then we have fifty pages devoted to the sources of international law generally and international water law incidentally. This is the most interesting part of the book and might well have come earlier, though it is only indirectly relevant to the text. Thirty pages are then devoted to municipal water laws and, with the qualification that it is dangerous to generalise the municipal water law of any one state into a paragraph, this survey is worth while. Finally the future of the law and Professor Berber's conclusions are given twenty pages. As stated earlier these conclusions are of a negative nature.

The book is free of misprints and the general production is of a fairly high standard. The translation by Mr. R. K. Batstone is of a commendably high order. On the other hand one feels that the work is rather expensive. Anyone referring to it in the hope of finding an answer or even an opinion on the disputes concerning the Nile, the Jordan and other great rivers will be disappointed.

J. A. Andrews.

Constitutional Law. By E. C. S. Wade and G. Godfrey Phillips. Sixth Edition. By E. C. S. Wade. [London: Longmans. 1960. xxx and 725 pp. £2 2s. net.]

In a review of the fifth edition of *Wade and Phillips* (18 M.L.R. 328–329) the present writer reluctantly diagnosed the early symptoms of arteriosclerosis. It is pleasant for him to record that rejuvenation has broken in and that in his opinion Professor Wade's sixth edition is the best yet. At least for the next quinquennium *Wade and Phillips* will occupy a place on the bookshelves of thousands of students.

The writer also suggested, in reviewing the fifth edition, that the book was too short. The sixth edition is in fact 167 pages longer. Only a small proportion of this considerable increase in size is accounted for by the inclusion of material based on developments in the intervening five years. A large part of the increase is due to the adoption of a new lay-out. The pages are slightly smaller; the type is less compressed; sidenotes have (very sensibly) been replaced by sub-headings. All this makes for easier reading. In addition, the sections on The Citizen and the State and Administrative Law have been substantially enlarged and have been transferred to the end of the book. *Wade and Phillips* has always been strong on administrative law, and the treatment of the subject now occupies 125 pages, with new chapters on development and sources. But the most spectacular expansion has occurred in the section on The Citizen and the State. There will be general agreement that it is right to include a chapter on contemporary security measures, but it is not immediately apparent that separate chapters on Contempt of Court and Obscene Publications are justifiable in a student's textbook on constitutional law. However, these important topics seldom receive adequate attention in other books for students, and the discussion here is to be welcomed. It is also gratifying to see that the European Convention on Human Rights and Fundamental Freedoms and the work of the International Commission of Jurists receive honourable mentions in the appropriate places.

Minor errors that appeared in the last edition have been corrected, and one notes that several suggestions for clarification and supplementation of the text have been adopted by the learned editor. It is rather disappointing to find that the discussion of parliamentary sovereignty remains briefer than the topic seems to deserve; but Professor Wade is clearly unimpressed by the doubts that torture some of us. On the right of public meeting, he has been persuaded to take a more conservative view of the implications of *Duncan* v. *Jones* [1936] 1 K.B. 218; it is remarkable that in this very important matter we should still have to speculate on the meaning of the unilluminating

judgments in a single case. Telephone tapping makes its bow, and Professor Wade shows that like many others he finds difficulty in attributing this practice to an exercise of the royal prerogative.

A miscellany of minor comments may be added. The circumstances in which Mr. Macmillan came to be appointed Prime Minister are surely worthy of mention; so too are the expressed views of the Labour Party on the proper procedure to be followed for the appointment of a future Labour Prime Minister. The word "not" has been omitted from a sentence on p. 94 dealing with the *Wensleydale Peerage* case. Provisional Order Confirmation Acts have ceased to be of importance as a means of acquiring statutory powers (pp. 141–142). It is doubtful whether a court would accept the view that the "privilege of freedom of speech extends to words spoken outside the House of Commons if spoken in the essential performance of a duty as a Member, *e.g.*, a conversation on parliamentary business in a Minister's private house" (p. 147). Only in a small number of dependent territories is any part of the constitution now embodied in letters patent (pp. 394, 406). The practice whereby superior judges in colonies would not be dismissed except with the approval of the Judicial Committee of the Privy Council has recently been incorporated in a large number of colonial constitutional instruments as a rule of strict law (p. 398). The franchise is no longer entrenched under the South Africa Act (p. 421). There is no reference to the fact that since the Federation of Malaya is a separate monarchy the Queen's capacity in relation to the Federation is merely that of Head of the Commonwealth. There is a discrepancy between the narrow definition of sedition adopted at p. 495 and the wide definition adopted at pp. 538–539. Sections 184 and 187 of the Local Government Act, 1933, were repealed by the Local Government Act, 1958 (p. 634). In the light of the judgments in the *Hastings* cases, is it really likely that courts in Commonwealth countries will continue to apply the principle laid down in *Eshugbayi Eleko's* case (1928) regarding successive applications for *habeas corpus*? And where is *Smith* v. *East Elloe R.D.C.*?

These are small points. One can utter the reviewer's valedictory salutation with an entirely clear conscience, for the book maintains an extremely high standard of accuracy despite its remarkable economy of language.

S. A. de Smith.

Highway Law. By C. A. Cross & J. F. Garner. [London: Sweet & Maxwell, Ltd. 1960. xxx and 505 pp. £4 4s. net.]

Our grateful thanks must go first to the Parliamentary draftsmen for such a monumental piece of consolidation as the Highways Act, 1959, and, secondly, to the authors of this book for having the Act annotated so well and so quickly. As the Act itself is the main part of the book it is impossible to review the one without the other. In both cases a fine job and a great service to the legal public have been done. Such criticisms as will be found among the praise that follows do not impair the usefulness of either the Act itself or the text.

First as to the Act: It is not pure consolidation: several opportunities have been taken to improve the law. But as consolidation what a magnificent effort it is to get into one statute all the early Victorian highway legislation together with all the late Victorian and modern law about private streets; nearly everything in fact except that masterpiece of obscurity the Public Utilities Street Works Act, 1950, which was presumably too much to tackle. It is an English custom to have two of everything in order to prevent a monopoly. We have an A.A. and a R.A.C.; a Red Cross and St. John's; therefore, the draftsman whilst abolishing the Acts has preserved the "Code of 1892" and the "Code of 1875," each doing the same job in a slightly different way. Is it too much to hope that they will eventually be fused?

In these matters does one detect the personal hand of the particular draftsman, as one does in his division of the subject-matter in the central parts of the Act dealing with the creation, maintenance and improvement of highways? This division is logical enough but there is a somewhat pedantic approach which does not always come off. For instance in the case of road ferries why separate out the improvement aspect (section 107) and at the same time merge the provision and maintenance aspects (section 26 (3))?

A perusal of the Act can be disillusioning to the man in the street; so much is mere law that one thought to be pure thoughtfulness. For instance, those amusing flood level indicators on low lying roads are not there because of the benevolence of the county council but because of what is now section 105 of the Act. On the other hand, how many authorities comply with section 70 of the Act and provide adequate grass margins to highways for the sake of ridden horses and driven livestock?

Turning now to the text of the book itself; can one again detect the personal hands at work? Is there not internal evidence and the record of other publications available from which this book has been culled to show that Mr. Garner is in the main responsible for the admirable introduction and Mr. Cross for the carefully compiled footnotes?

If this is the case, an interesting exercise can be had in comparing parts of the introduction by Mr. Garner with footnotes to the Act by Mr. Cross. For example, their reasons for the existence of the "non-feasance" rule vary at p. 40, note (*e*) and p. 427 (general note). In this case Mr. Cross is more correct than Mr. Garner; the latter is wrong in saying that criminal liability was held to exclude civil liability in *Russell* v. *Men of Devon*. Criminal liability was not mentioned in that case, the decision against Russell being on procedural grounds and the lack of precedent for such an action. The otherwise admirable note by Mr. Cross could have been improved by referring to *Young* v. *Davies* (1862) 7 H. & N. 760, which extended the Men of Devon principle to a surveyor of highways: this in spite of the fact that it had been conceded in the Men of Devon case that an action would lie against an individual bound to repair. It is always worth while to bring out the tortuous history of this branch of the law wherein successive bodies have inherited the immunities of their predecessors, however inappropriate. The matter is still under review and as Mr. Garner says at p. 40 the doctrine may well be abolished soon: it should never have survived.

Turning to detailed criticisms, one would have hoped for a somewhat fuller treatment of the right to pass and repass than note (*c*) on p. 10: only annoyance and "the Duke of Rutland" is mentioned and not the vastly more important aspect of obstruction. More understandably the authors have fought shy (p. 17) of a definition of the word "scrapings" taken from the 1835 Act. These vest in the highway authority and fascinating thoughts can be pursued about what they include. This reviewer has an annual race for the leaves from his trees with the local roadman and the authors do not really help either of us in our law. It is a little irritating to be told on p. 18 that the question of the payment of tithe redemption annuity has been settled in a recent case without being told the decision, which was in fact against the highway authority. The choice, as an example of a case when no owner is capable of dedicating a highway, of land held under strict settlement is perhaps unfortunate in this day and age. One should criticise the Act for perpetuating in section 159 the harsh section 30 of the 1925 Public Health Act and at the same time making it less obscure, therefore, more easily operated. One should also criticise the authors for comparing this section, whereby the highway authority are able to make frontagers to new streets not only give away their land for nothing but also pay the cost of its making up, with the position under certain planning conditions (see p. 57): planning conditions can never be aimed at getting something for nothing.

Turning back to the credit side there is an excellent summary (at p. 27, *et seq.*) of the various powers to stop up and divert highways in the new Act and other Acts still in force. Equally valuable is the admirable account of the law of building lines, improvement lines and similar matters (at p. 49, *et seq.*) There is also an extremely useful comparative table of the old and new legislation. In sum the book is an excellent account of the present state of the law. We hope, with the authors (p. 19 and elsewhere) for further improvements and greater clarity in the law, and when this has come about one hopes for a still fuller treatment of the subject by these authors. In the meantime this book will be of the greatest value both to the private practitioner, to whom the original articles in *The Conveyancer* were aimed, and also to the local government lawyer to whom this book is a necessary tool of the trade.

H. B. Sales.

Palmer's Company Precedents. Seventeenth edition. Part 2, Winding-up Forms and Practice. Editors: R. A. K. Wright, of Lincoln's Inn, Barrister-at-Law, and R. Buchanan-Dunlop, of the Middle Temple, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1960. xciv and 1168 pp. £7 7s. net.]

The work of reviving the "big Palmer" proceeds slowly but surely. Four years after the welcome appearance of Part 1, Part 2 now appears. Mr. Wright has now replaced Mr. K. W. Mackinnon, Q.C., as one of the new editors, but the horse comes from the same stable and the work of preparation has been equally thorough. In this edition Part 2 has a smaller scope than in previous editions because Arrangements, Reconstructions and Amalgamations have been relegated to Part 3, which is now in preparation. Clearly, the subjects so relegated were especially in need of revision and expansion but unless the final volume can appear with considerably less delay than has occurred between the appearance of Parts 1 and 2 it may be caught up by new company legislation flowing from the work of the Jenkins Committee and be rendered out of date almost as soon as it is published. Furthermore, the growing spate of take-overs and mergers makes a full treatment of these subjects a particularly urgent need.

However, these observations are merely intended to spur the learned editors to still greater efforts and not to encourage them to produce a botched job. Palmer has suffered enough from that in the past. Happily the present volume shows that they are determined to maintain the high standard set in Part 1. Detailed review of a volume of this sort is hardly possible until the work has been extensively tested in practice. All one can usefully say at this juncture is that it is clearly an enormous improvement on the previous edition and that no practitioner working in the field of companies' winding up can afford to be without it. Mr. Michael Miller, who is responsible for the index, deserves an especial tribute for a thankless task unusually well-performed.

L. C. B. G.

Prideaux's Forms and Precedents in Conveyancing. Volume 3. Twenty-fifth edition. By I. M. Phillips, E. H. Scamell and V. G. H. Hallett, Barristers-at-Law. [London: Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. xcvi and 1014 and (index) 124 pp. £6 6s. net. (Three Volumes).]

The third volume of *Prideaux* covers the widest range of subjects of the whole set, including as it does, Settlements, Trusts, Wills, Assents, Charities and a

miscellaneous section—each with the exception of the latter, preceded by what at one time were termed "dissertations," but are now either unentitled or prefixed by a modestly-styled "Introductory Note," all affording valuable guidance, and some comprising a comprehensive statement of the law and practice, in each case with referential pointers to the authorities, statutory and judicial, taking the practice of conveyancers into full cognisance. The new edition has not followed its predecessor in including Settlements framed for the purpose of saving from liability to income tax and surtax, regard being had to precedents in books particularly concerned with that object. It has also parted company with its predecessors in respect of the division of Wills into "Real" and "Personal," and classified them for the purpose of Precedents into "Precedents of Wills (Conversion Trusts)" and "Precedents of Wills (Real)," but the large collection of "Forms" as contrasted with fully developed "Precedents" covers both Wills real and personal. The section on "Assents," Part VII, contains several new forms to which there is an ample "Introductory Note." Therein the learned editor of the section (Mr. E. H. Scamell) has no hesitation in affirming that an assent to the vesting of a legal estate must be in writing, and observes (p. 896) that "Since the decision in *Re Hodge* ([1940] Ch. 260) the view has been advanced that where the personal representatives and the persons in whose favour an assent is required are the same (though the capacities in which they are to hold may change), the assent may still be implied and need not be in writing. If correct this would apply to the most common case in which a testator appoints the same persons to be both executors and trustees of his will. The view is considered to be wholly unsound" and adds that *Re Hodge* (*supra*) does not really deal with the matter of assents and title to land at all and even cites the passage at p. 264 of the report which seems to except the necessity of a written assent as between vendor and purchaser. He does not specifically refer to or discuss the oft-quoted county court case of *Harris* v. *Harris* (1942) L.J.N.C.C.R. 199, which has been described as of some authority in the absence of any higher decision, although he gives a reference to the *Encyclopaedia of Forms and Precedents* where it is dealt with. At its lowest it is instructive if not authoritative, while it is frequently adopted in practice. At pp. 663 and 664 it is admitted that since the decision in *Re Hodge* (*supra*) the view that there may still, since 1926, be an implied assent by personal representatives to themselves as trustees for sale has gained ground. These observations are not new as they were contained in the preceding edition of *Prideaux* but they are testimony to the continuance of a prevalent view in this behalf.

An instance of the wide range of annotations provided in *Prideaux* is to be found at p. 900 in the matter of Stamp Duty on Assents where there is a reference to an adjudication reported in "Practical Points" in a column of the Law Journal, 80 L.J.Newsp. p. 327.

Parts I, II and III, which deal with Settlements and Trusts and are at the very centre of difficult conveyancing, are under the learned editorship of Mr. I. M. Phillips. It should be reminded that Section 10 of Part III includes "Vesting Instruments" while "Administration Instruments and Assents other than Vesting Assents" are separately treated. The Introductory Note on Vesting Instruments is notably informative and affords much in a minimum of space without sacrifice of lucidity. The separation of Assents from Vesting Assents helps to dispel the confusion still to be found among some practitioners in respect of nomenclature between the two distinctive forms of instruments, although this is no new feature of *Prideaux* while nevertheless noteworthy as a perpetuation of a logical arrangement.

The preface states that "new strict settlements are out of fashion, but it has been thought advisable to include the limitations of strict settlements in case of need. In addition an intelligent perusal of many abstracts of title for some years to come will require a knowledge of the details of real settlements and for this purpose the forms and notes will be useful." Emphasis

must be placed upon the word "new," for the property legislation of 1925 brought the machinery of the Settled Land Act of that year into thousands of titles which but for that machinery bear no resemblance in quantum, (and often but for one life estate) to strict settlements in the full connotation of the term, and thus the section on Vesting Instruments under the learned editorship of Mr. I. M. Phillips is not only extensive but of very considerable practical value whenever the Settled Land Act comes into consideration. A notable addition is a form enabling a protected life interest to be surrendered and an overriding power to the trustees has been inserted.

In the section on Wills additional references have been made to cases both in the text and footnotes and the important, although indirect, bearing on testamentary dispositions and the extended range of operative effect upon the passing of the Inheritance (Family Provision) Act, 1938, and the amendment of intestate succession have been given adequate attention. Furthermore, there have been useful accessions to the Forms of Assents, well annotated, a matter of everyday concern to the practitioner.

The preface expressed the hope that "when the time arrives for the next edition of this work, the present medley of statutes which affect Charities (not to mention the case law) will have been integrated into one harmonious whole," a sentiment which neatly describes "a consummation devoutly to be desired," but one which not even the most optimistic about the new Charities Act, 1960, could with confidence assert that it has altogether accomplished. The Charities section of successive editions of *Prideaux* has generally been regarded as one of the most useful contributions to this sphere of Conveyancing, and the present edition worthily upholds the tradition and indeed enhances it, but the consequence of the new statute is that, to enable the section to be in line with the contemporary law, a supplement is undoubtedly necessary; which might either be in referential form or a short supplementary volume restating the law where necessary and similarly adapting the forms and precedents.

There is a short "Part IX" consisting of Miscellaneous Instruments of which Mr. V. G. H. Hallett is the learned editor. Two additional forms of Articles of Clerkship have been introduced, but this is a section of the work which might well be expanded.

There is an index of some 122 pages, but one has a feeling that there is really more in *Prideaux* than the index, well compiled though it is, actually reveals. The three volumes reviewed in these columns are in the high tradition of a classic work in the literature of the law of property and the practice of conveyancing.

Bertram B. Benas.

Gatley on Libel and Slander. Fifth edition. By Richard O'Sullivan and R.L. McEwen. [London: Sweet & Maxwell, Ltd. 1960. 771 pp. £7 7s. net.]

Gatley has always been, and in this edition continues to be, one of our better monographs for practitioners. On the other hand, if it is to be judged by the highest standards, it is not an ideal detailed treatise on defamation.

First, the editors often take the easy course of describing the facts of cases without relating them to principle. We are told that what is defamatory depends on time and circumstances, that the jury decide whether a statement is defamatory. Should we then say that it is defamatory (in the context this must mean that courts are now bound so to hold) to say that a person has scarlet fever, and not defamatory that a trade unionist insists on working when his union has called him out? If one looks to *Gatley* for a lead on topical questions, one will usually find nothing if the cases have not discussed it and often no guidance even if they have. Take the problem of criticism of

consumer products. We are given the rule that this is libel "where it reflects on the . . . manufacturer of the goods in his character as a man or as a tradesman." On the next page a case which stated that it is not defamatory to state that a tradesman's products did not answer their purpose is set out without comment. This unqualified reliance on cases has other drawbacks: statements will appear in the text in equally authoritative language, and the reader will be given no hint that one is the aside of the Court of Star Chamber in a criminal case three hundred and fifty years ago, and another the considered judgment of the House of Lords. The editors have not attempted to interpret the difficult "innocent publication" provisions of the 1952 Act. The only comment they make must surely be wrong: that section 4 (6) recognises or establishes the rule that malice on the part of any of the persons who participate in the publication of defamatory words is sufficient to defeat a plea of fair comment by any of them. They rely on American cases for the questionable view that the Independent Television Authority is answerable for libels published by contractors and advertisers: surely this is to ignore the vital differences between the position of commercial television companies in the United States and the supervisory functions of the I.T.A.

Several of their views on fair comment merit discussion. In a section headed "Imputation of corrupt or dishonourable motives" they disagree with the interpretation of *Campbell* v. *Spottiswoode* by Lord Atkinson in *Dakhyl* v. *Labouchère* and hold that his views are in direct conflict with *McQuire* v. *Western Morning Evening News*. But the rule about corrupt motives is quite separate from the general rule of fair comment that the jury must not merely decide whether they disagree with the comment, and *McQuire's* case had nothing to do with corrupt motives. Nor does it help to characterise the views of the House of Lords which conflict with one's argument as dicta, and those of the lower courts which support it as decisions. In their support of the controversial *Mangena* v. *Wright* they cite *Bailey* v. *Truth and Sportsman, Ltd.* in the High Court of Australia, which in fact contains reasoned criticisms of the case. *Thomas* v. *Bradbury Agnew* is said to have held that the innocent printer of a criticism prima facie fair was liable in damages on proof that the writer was actuated by malice, but was this point taken either in the pleadings or in argument? The editors keep *Phillips* v. *Barnet* at the top of the league for the most frequently misspelt cases in English law books.

In their preface the editors make the valid point that the law retains a measure of homogeneity throughout the Commonwealth and the United States. It would therefore be an important contribution if, as they imply, the work had been kept up to date in respect of these other jurisdictions. Defamation is ordinarily an unimportant tort in the United States, but in fact there has been an exceptional crop of important decisions even in the U.S. Supreme Court itself, on executive privilege since the previous edition: none of these is mentioned. On the other hand they are to be congratulated on the thorough way in which they have brought the English cases up to date. This is particularly important in view of the curious absence of so many of the leading cases from any law reports other than *The Times*.

Is there any justification (other than an inadequate semantic one) for including slander of title and goods in the book? One would have thought that they are much more closely related to the other economic torts such as passing off. In any event the chapter is unsatisfactory. *Wilkinson* v. *Downton* is treated as a case on injurious falsehood, but there can be no doubt that it is a separate tort—the state of mind required differs materially from the malice necessary for injurious falsehood. We are told that dicta in modern decisions imply that wilful intention to injure need not be proved, whereas the old decisions rightly required proof of such malice: one need hardly add that Newark's excellent article in the *Law Quarterly Review* is not cited.

Gatley has so many good qualities that it is capable of being made an excellent book. May the present editors achieve this next time!

Harry Street.

Bowstead on Agency. Twelfth edition. By E. J. Griew. [London: Sweet and Maxwell, Ltd. 1959. lxxxviii and 335 pp. £3 10s. net.]

As the editor points out in the preface, this work has now passed its golden jubilee and both he and the publishers have combined to produce an edition worthy of the occasion. The book now appears in the binding of the Common Law Library and, though one might perhaps have hoped for a rather better quality of paper, the work still avoids unwieldy bulk and the fact that it is now to have a supplementary service will doubtless much increase its value to practitioners.

The editor provides in the preface a very full statement of his aims and the changes that he has effected in content and arrangement. He says: "Much of the art has been to conceal art, to the end that the book should remain as nearly the same book as possible." In spite of this self-denying ordinance four former Articles have been deleted and six substantially rewritten. Those which have gone dealt with damages, foreign principals, criminal liability and brokers' bought and sold notes, this last topic being affected by the Law Reform (Enforcement of Contracts) Act, 1954. In a further ten Articles new expository material has been added and throughout the book numerous minor amendments have been made in case citation, illustration and the like.

The work of rejuvenation has been skilfully done and a happy and useful old age seems well in prospect. One especially welcome feature of the work of editing is the generous frequency of reference to other textbooks, periodicals and the American *Restatement*. In regard to this sort of apparatus the book must now rank amongst the best served of the practitioners' works.

Though the editor is presumably right in supposing that practitioners will appreciate the retention of the familiar lay-out, he also seems to anticipate some continuance of the coolness with which academic lawyers have always regarded the book and this seems to indicate the chief criticism which could be levelled against the present work of editing—that it is insufficiently radical. As Lord Chorley remarked in a review of a previous edition (8 M.L.R. 256), Bowstead did not possess the genius of a Pollock or a Chalmers or a Scrutton as a draftsman and the course of several editions does not appear to have sufficed to eradicate many blemishes from his work. Hence it is still possible to find Articles (*e.g.*, Article 12 and Article 39) which add nothing to their preceding Articles and others which might more properly have formed a section of another Article.

Apart from this there are a number of the minor slips which are the almost inevitable concomitants of any publication of any size. Thus the Metalliferous Mines Act, 1872, which is mentioned in Illustration 2 at p. 18, has been repealed and replaced by the Mines and Quarries Act, 1954. The treatment of the liability of an employer for the torts of his independent contractor at p. 16 seems to imply that no duty of care can be escaped by delegation and also fails to make any mention of the cases on collateral negligence. Since a reference is given to the article by Mr. Chapman, 50 L.Q.R. 71 on this topic a reference might also have been given to the much more recent article by Dr. Glanville Williams [1956] C.L.J. 180 which takes a very different standpoint. Despite the wealth of case-citation, entirely proper to a practitioner's work, it is still possible to find an occasional case of interest which seems to have been overlooked. Thus *Brown* v. *Bedford Pantechnicon*

Co. (1889) 5 T.L.R. 449 and *Moody* v. *Pall Mall Deposit Co.* (1917) 33 T.L.R. 306 on the Factors Acts and *Harrisons & Crossfield Ltd.* v. *London & North Western Ry.* [1917] 2 K.B. 755 on partial ratification would seem to deserve a mention. Incidentally, though *Broom* v. *Morgan* [1953] 1 Q.B. 597 is mentioned in the notes to Article 99 on vicarious liability in tort, it does not find a place in the table of cases. There is also a curious defect in the style of citation for the *Canadian Bar Review*. As previous reviewers have remarked that the style C.B.R. is actually proper to the Canadian Bankruptcy Reports it would seem to be as well if this were corrected.

In spite of these few points of criticism, the final judgment seems to be that, within the limits placed upon him, the editor has done very good work and given a useful new lease of life to a work which has served lawyers well, though perhaps not brilliantly, during its long career. It is to be hoped that in the not too far distant future the editor will be allowed another opportunity to further the work he has begun, and under a less restrictive directive.

A. H. Hudson.

Taswell-Langmead's English Constitutional History from the Teutonic Conquest to the Present Time. Eleventh edition. By T. F. T. Plucknett. [London: Sweet & Maxwell, Ltd. 1960. xx and 701 and (indices) 32 pp. £2 7s. 6d. net.]

This authoritative history remains the best students' work on the subject, and is particularly suited to prospective lawyers, as it is written from a legal angle and edited by an eminent legal historian. Since your present reveiwer last saw the book in his own student days, it seems to have grown considerably, not only in size, but also in readability and attractiveness of presentation; a further step has been taken in the latter direction by the decision to excise in the present edition much of the financial and commonwealth material that has appeared in earlier editions.

One of the more attractive features of *Taswell-Langmead* is the inclusion of references—and not just in the footnotes—to the original sources, both the familiar and the more unusual. Thus, the genuine version of the schoolboy story of "Morton's Fork" (or "crutch") appears on p. 227, the Queen's own words are reproduced, on p. 319, when the learned editor is discussing Elizabeth I's relations with her Parliaments, and the text of the Act of Settlement will be found set out verbatim on pp. 461–463.

The learned editor has included in this edition (which is the first to have appeared since 1946) many references to recent publications and periodical literature, but unfortunately he has not noticed, on pp. 685 and 691, that Mr. Keith-Lucas has recently brought out an excellent new edition of Volume I of Redlich and Hurst's *History of Local Government in England*; the first edition, which appeared in Edwardian days, has been out of print for some time. The present edition seems to bring the history of local government to a full stop rather too early in point of time—no comments, except on the subject of education, are included about twentieth-century developments, and the rise of the Welfare State receives but a paragraph at the end of Chapter 21.

The indices could be improved upon; there is too much cross referencing in the alphabetical index, and in the Table of Statutes we noticed that no reference has been included to the Life Peerages Act, 1958 (mentioned on p. 560). A select bibliography might be worth including in the next edition.

The book is well produced, and the price asked is most reasonable.

J. F. Garner.

ASCAP Copyright Law Symposium, Number 10. [New York: Columbia University Press. 1959. 479 pp. (with index). 40s. net.]

Copyright in Industrial Designs. Third edition. By A. D. Russell-Clarke. [London: Sweet & Maxwell, Ltd. 1960. 233 pp. (with index). £2 net.]

Specialists in copyright in this country will already be familiar with this series and will be aware that the annual volumes comprise essays on the subject of copyright law contributed by students from American law schools.

The high standard of these essays, their maturity and grasp and awareness of practical problems, do credit both to the writers and their respective law schools. Indeed, for an English lawyer, such a volume as this comes as a surprise, not only for the high standard attained by law school students but also on account of the wide interest it reveals in such a specialised subject as copyright law, an interest sufficiently evidenced by the publishing of an annual volume of this kind over a period of ten years. Of course, those concerned with copyright matters will certainly be aware that copyright is a subject of far greater importance in American legal practice than it seems ever likely to attain in this country and no doubt this accounts for the livelier attention which is paid in America to its problems.

This volume contains ten essays as follows:

"English Experience with Registration and Deposit," by S. A. Olevson;
"Tape Recording, Photocopying and Fair Use," by R. Needham;
"The Scholar and the Copyright Law," by J. L. Wilson;
"Problems in the Transfer of Interests in a Copyright," by A. R. Miller;
"The Jukebox Exemption," by E. Mooney;
"Related Rights and American Copyright Law," by L. L. Phillips;
"The Relationship Between Copyright and Unfair Competition Principles," by M. L. Feldman;
"News: Public Right versus Property Right," by W. F. Swindler;
"Contributions to Periodicals," by D. J. Caterini;
"Copyright Publication: The Sale and Distribution of Phonograph Records," by P. H. Morris.

It will be seen merely from the list of essays that the book contains discussions on many interesting topics of considerable practical importance. The English reader will perhaps be struck by the rather old-fashioned attitude of American copyright law to many of the new problems in the subject, which have been dealt with in this country by specific new legislative provisions, though perhaps not always adequately. To some extent this no doubt flows from the peculiar constitutional position whereby the power to legislate, regarding copyright, is limited to promoting the progress of useful arts by securing for limited times to authors the exclusive right to their writings. This seems to have had the effect of drastically limiting the scope of American copyright law in its application to new developments, such as phonograph records and broadcasting. Moreover, American copyright procedure is still tied to various formal requirements, which English law has long abandoned, such as the need for registration. Indeed, so far as registration is concerned, it seems apparent from Mr. Olevson's thoughtful and scholarly essay on the English history of this matter, that there is little to justify the continued American insistence on this requirement. Then again, the curious insistence of the American law, that copyright is indivisible and, therefore, can only be assigned as a whole, leads to many problems in connection with the transfer of interests in copyright which do not arise under a system such as the English one, where there can be a partial assignment of copyright. Also difficulties appear to arise in American law because of the continued retention of common law copyright in respect of unpublished works, so that two kinds of copyright,

common law and statutory, compete for protection. But perhaps the greatest oddity discussed in this volume is the provision of the United States Copyright Act of 1909, which specifically exempts reproduction by coin-operated machines (*i.e.*, jukeboxes and the like) from being treated as a public performance. It was some consolation to the present reviewer to ascertain that, in Mr. Mooney's view, there is little or nothing to be said in favour of affording such encouragement to these infernal machines.

The main development in American law as revealed by these essays which could afford useful lessons for our own system, is that of unfair competition. This doctrine, which is a development of the common law, has been given a very wide scope in American law, and by its means not only have gaps been filled in American copyright law in the strict sense, but also protection has been secured in matters outside the present scope of copyright. For instance, protection may be obtained in American courts, in relation to the repetition of live performances, even though these do not contain any element of copyright in the formal sense. Again, protection has sometimes been afforded in regard to items of news or mere factual information, where there is no element of copyright but the circumstances have involved some form of unfair competition. This seems to be a most valuable principle, capable of many applications and a good deal more flexible than the rather limited type of "passing off" action permissible under English procedure.

Undoubtedly, the English copyright lawyer will find much of interest in these essays to compare and contrast with his own system and will wish continuing success to this excellent series, to which the present volume makes a valuable contribution.

Mr. Russell-Clarke's book, which has now attained three editions, is well known to those concerned with the subject with which he deals. The first edition was in 1930 and dealt solely with industrial designs. The second edition in 1951 departed from this limitation by dealing also with general copyright law. The third edition now reverts to the approach of the first edition and the author seems to have been well advised in making this change since a specialised examination of the law of copyright in industrial designs seems hardly consonant with the necessarily brief and sketchy treatment of general copyright law which was all that the second edition could provide, having regard to the size and general scheme of the work.

The main development since the last edition has been the introduction of the Copyright Act, 1956, which has substantially altered the provisions of the law governing cases where ordinary copyright and industrial copyright overlap. The 1956 Act, which is certainly not without faults in many respects, has at least introduced a certain measure of rational order in the relationship between these two types of copyright, though it might well have done it in a simpler fashion. Mr. Russell-Clarke has given a clear explanation of the effect of the 1956 Act, though it is a little strange that he omits to cite the Copyright (Industrial Designs) Rules of 1957. This book can be recommended as a useful survey of the law on this important topic.

Dennis Lloyd.

Trade Union Law and Practice. By H. Vester and A. H. Gardner, o.b.e., t.d. [London: Sweet & Maxwell, Ltd. 1958. xxx and 291 and (index) 9 pp. £1 15s. net.]

The Development of Australian Trade Union Law. By J. H. Portus. [Melbourne: at the University Press. 1958. xxix and 261 and (index) 5 pp. £2 17s. 6d. net].

The appearance at about the same time of Mr. Vester and Mr. Gardner's work on English, and Mr. Portus' work on Australian, trade union law is of

particular interest. It is of particular interest because of the vital difference in approach that is revealed in the two books.

Mr. Vester and Mr. Gardner's book is a much more ambitious sequel to their original work on trade union law. In the course of some 190 pages of text and 100 pages of statutes, rules and forms it goes over the law governing trade unions with, however, slight if any reference to the "practice" that is included in the title of the work. Nor is the authors' interpretation of the law influenced in any discernible way by reflection on the practices of trade unionism.

But, the absence of consideration of the function of trade union law does not detract from the value of the work purely as a clear compilation of the relevant rules. While it does not possess the qualities of style and readability that one may properly expect of a text book, the authors have nevertheless avoided the worst excesses of pedestrianism that feature in too many works of reference.

For the trade union official, managerial representative and practising lawyer, *Vester and Gardner* is a very useful handbook in which the answer or a lead to the answer to most legal problems arising in practice is likely to be found. For the law student, however, as also for the non-law student who studies trade union law as part of a wider discipline in the social sciences, this work is probably the best book that may be recommended in the field. Lacking the rather over-involved and, for educational purposes, excessively detailed treatment of *Citrine*, Vester and Gardner have at least given themselves room in which to consider a number of the important problems that arise in one of the most difficult branches of English law.

While *Vester and Gardner* is a book for earnest reference or determined study, *Portus* is one that gives not only instruction but considerable pleasure. The English book displays at once the strength and the weakness of much English legal scholarship even at the present day: accurately analytical, blandly incurious. Why English trade union law is what it is in English society, what functions it serves in English labour relations, how it affects and is affected by those relations as well as by social relations in the broad sense, are not questions which the English authors have permitted to detain them. In all these questions, however, as well as in the technical one of what Australian trade union law is, Mr. Portus is plainly profoundly interested. The wide interest he takes in the various facets of his subject appears to be due, partly, to the deeper approach of Australian legal scholarship, partly to the author's own predilection and admirable vantage point as a Commissioner member of the Australian Commonwealth Conciliation and Arbitration Commission.

His work is divided into two main parts. The first is an excellent account of the English background to the Australian law, which students of English trade union law itself may well prefer to the work of authors in this country scanning the same legal arc.

The second part of Mr. Portus' book analyses and explains the complicated law of Australia governing internal union relations, the world-wide problem of the three freedoms—to join a union, to join the union of one's choice, not to join a union at all—the close, legal control of strike action in Australia, and, finally, the distinctively Australian system of compulsory arbitration.

The complexity of collective labour law varies in direct proportion to the degree of government intervention. Australian collective labour law is, therefore, extremely complex, and the complexity of this "new province for law and order" in Australia is compounded, as always, by the existence of a federal structure of government. More than any other work that the reviewer has read, Mr. Portus' book places in the English reader's hands the key to a mastery of the legal principles of Australia's unique social experiment.

C. Grunfeld.

Products Liability in the Automobile Industry. A Study in Strict Liability and Social Control. By Cornelius W. Gillam. [Oxford: at the University Press, for Minnesota University Press. 239 pp. £1 18s. net.]

Although this book is concerned with the American legal situation in respect of the liability of manufacturers of vehicles to ultimate purchasers and users of such vehicles, it is not without interest to lawyers on this side of the Atlantic. The English tort lawyer will remember that it was a New York decision, *Macpherson* v. *Buick Motor Co.* (involving the manufacturer of a car in liability for negligence to a purchaser from a dealer to whom the manufacturer had sold it), which played an important part in the decision in *Donoghue* v. *Stevenson*. It was the extension by Cardozo J. of the exceptions to the "privity" rule that helped our own courts to rid themselves of the shackles on the development of tort liability that had been forged by *Winterbottom* v. *Wright*. Hence this study of the way that American courts have followed, and extended, the *Macpherson* ruling, and how American courts have approached the contractual and tortious aspects of the liability of manufacturers to ultimate consumers, is instructive to English lawyers and relevant to the English legal scene.

The author has gone to great pains to collect and discuss all the American decisions which raise problems in connection with such liability. In this lies the value of this monograph. It deals not only with the technicalities and difficulties of negligence liability (such as the problem of proving negligence and the consequent use of *res ipsa loquitur*), but also with the way in which warranties as to quality have been and could be used to impose liability on manufacturers. The advantage of the use of warranties in this respect is that liability for their breach is strict, not dependent upon proof of negligence, a liability of which the author seems to approve on economic grounds. But the hindrance to such an approach to the problem has been what he terms the unfortunate but historically accidental decision that an action for breach of warranty is contractual in character, not tortious. Therefore privity of contract between manufacturer and consumer was and is required for such strict liability to ensue. The author gives twenty-nine ways in which American courts, having disposed of the tort aspects of the privity rule with dynamic concepts of deceit, invitation and negligence, have proceeded to attack the contract side of the question with fictions, subterfuges, and bold strokes. They make interesting reading in the light of the English insistence on what might be called the "purity" of the doctrine of privity, to which exceptions are few and seem to be well settled.

This is therefore a stimulating as well as informative discussion of the legal difficulties involved in enforcing standards upon manufacturers. However, it is not merely a technical discussion. For the author is interested in the practical, social and business aspects and results of the development of the law. His closing chapters are about managerial responses to the shifting of the risks of liability from consumer to producer and the relationship between strict liability and social control in this context. In this respect, therefore, this is not only a book for the tort lawyer: it is also a book for those interested in the social implications of law.

G. H. L. Fridman.

Urheber- und Verlagsrecht. By Eugen Ulmer, Professor of Law at the University of Munich. Second edition. [Berlin, Göttingen and Munich: Springer-Verlag. 1960. xiii and 471 pp.]

When the first edition of this work appeared in 1951 it was universally hailed as an authoritative exposition of the German law relating to copyright and

publishing agreements. The years which have passed since then have greatly enhanced its reputation. In the Continental laws it is in general, of course, the function of the large-size commentary on the Code or Statute to be the repository of judge-made law and the guide to future legal development. But the various German Acts which deal with the topic of this work are characterised by exceptionally bad draftsmanship. They have for long been obsolescent: questions of which the legislature did not think and solutions which it would hardly have approved at the time when the Acts were passed make up the bulk of contemporary German copyright law. For some time past there has been no large-size commentary on either of the two Copyright Acts. The first edition of this book was an attempt—largely successful—to fill the gap. The second, which contains a great deal more material and devotes particular attention to summarising and criticising the decisions of the Federal German Supreme Court, is sure to close the breach.

Fortunately it would be quite wrong to conclude from what has been said that the learned author has aspired to record all, or at least the majority of, decided and reported cases. While all major questions are fully dealt with by him, the case material—as befits a legal system which has never known the stiff yoke of the binding force of precedents—is used to illustrate the author's conclusions or—more rarely—to be the subject-matter of critical analysis. Nevertheless, the bulk of the more important recent Supreme Court decisions will be found duly noted. Thus, the book, though written primarily as a work of scholarship, can be, and is in fact being, used by every contemporary practitioner of German copyright law as his first—and often as his sole —work of reference. Comparative lawyers, it may well be hoped, will use it in a more extensive manner. In this country the law of copyright has not been to any great extent the subject-matter of academic study. There can be little doubt that the consequence of this fact is that our law is in many ways out of step with the contemporary Continental legal systems. A perusal of Professor Ulmer's work will not merely confirm this fact, but also convince any unbiased reader that the predominantly empirical approach of English law has by no means conferred such benefits upon our law as apologists are accustomed to assure us. Perhaps the most convincing example is the *droit moral* which our own Committee of 1952 brushed aside as wholly unnecessary. In the present work the powers and interests following from the copyright are subdivided into two groups, the first being headed " rights of user " and the second " rights of personality," these latter corresponding to what Continental doctrine generally understands by the *droit moral.* Thus an entire chapter is devoted to rights which are non-existent under our law and which, in the present writer's submission, secure to authors, composers and artists benefits which in justice and fairness should very obviously be granted to them.

As an academic writer the author has wisely not confined himself to dealing with the *lex lata.* Copious references to the Bonn Government's draft of a new Copyright Act, to the views of a number of national and international bodies and to those of learned writers enable the work to be used as a guide to modern tendencies in Continental copyright. In this as in other legal fields standard contracts, in particular those of the various organisations engaged in controlling copyrights, play an important part. The author has dealt briefly—perhaps a little too briefly for the outsider—with this aspect of the matter which in this country has so far been left aside completely by legal writers.

Another aspect in which this work excels is the large number and most skilful selection of comparative remarks. Naturally, the author's attention was in the first instance devoted to German law. Comparative material is used by way of underlining solutions found in Germany or in order to show that these solutions are not the only possible ones. Nevertheless, the reader obtains a remarkably extensive inside view of the working of other legal systems, in particular that of the U.S.A., Switzerland and France. The law of copyright

is of fairly recent origin: one must regret that in the fairly short period of its development remarkably large differences have developed between the various legal systems—even if the laws of the Eastern systems are left out of account. Leaving aside the laws of the U.S.A., our own law seems to be the chief sinner in this respect. The Committee of 1952 heard no evidence on any foreign legal system. One may well wonder what would have been the effect if more attention had been given to some of the animated discussions on the Continent on topics which seem never to have reached the ears of the English legislature.

There can be little doubt that any English lawyer who wishes to acquaint himself with the trends of development or the law of copyright on the continent of Europe cannot do better than to resort to this work, which transmits to him all relevant knowledge in a style distinguished by great lucidity, illustrated by a wealth of most interesting examples and interpreted with a breadth of view which demonstrates the author's constant endeavour to deal in fairness with all the manifold and opposing groups and interests whose combat and interplay make this field so singularly attractive.

E. J. Cohn.

Das Seefrachtrecht der Haager Regeln nach Anglo-Amerikanischer Praxis. By Hans Norbert Götz. Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht, Vol. 7. [Bielefeld: Deutscher Heimat-Verlag Ernst und Werner Gieseking. 1960. 227 pp.]

Die Uebernahme der Haager Regeln in die Nationalen Gesetze über die Verfrachterhaftung. By Demetrios J. Markianos. Uebersee-Studien zum Handels-, Schiffahrts- und Versicherungsrecht, Vol. 26: 1960. [Hamburg: Schiffahrtsverlag "Hansa" C. Schroedter & Co. 300 pp. DM. 36.00.]

Both books have been written in centres devoted to research into shipping law —Hamburg and landlocked Frankfurt-on-Main where the editor of the principal commentary of the shipping sections of the German Commercial Code occupies the chair of commercial law. Both books are profound studies going into great detail and displaying a high degree of scholarship. German research in this field has been delayed because the Hague Rules became law in Germany only shortly before the 1939–45 war and the urge to explain the Rules could not be realised until that country had returned to normal many years later.

Dr. Götz's book on the Hague Rules in English, Commonwealth and U.S. courts has been written to acquaint German lawyers with rules which are strange and with legal thought that is still stranger to them. English lawyers sometimes take it for granted that their shipping law, because of its long tradition, qualifies for adoption anywhere in the world. The reviewer once asked one of the British delegates to an international conference what arguments had proved so powerful as to persuade the delegates of other countries to exchange their centuries-old concept for that prevailing in England. The answer was: "Oh, I suppose we just steamrollered the opposition."

The effect of steamrolling delegates sometimes has unforeseen effects at a later stage when international agreements come to be enacted in national parliaments and to be interpreted in national courts. Then, removed from the international climate of a conference, unwillingness or inability to understand the adopted foreign thought leads to divergencies revealing the limited power of international legislators to create uniform law. English judges, when construing provisions of the Hague Rules, have occasionally spoken of the need to bear in mind their international character. Yet on the

whole English judges need not sacrifice cherished concepts to be broadminded. They are on home ground when construing the Hague Rules. Real difficulties are experienced by their brethren abroad who—because delegates of their countries allowed themselves to be "steamrollered"—are compelled to deal with a statute that is an alien body in their national law.

Dr. Markianos does not deal with this problem, but with a problem that arises earlier and is no less difficult—the adoption of the Hague Rules by national legislatures.

He points out that the Hague Rules, since they emerged from the terms of bills of lading, lack a general rule of the carrier's liability, and that national legislatures had to consider the best way of incorporating this document, which was strange to them, in their laws. Reviewing a very large number of laws, the author explains how some countries simply enacted the Hague Rules, in much the same way as Britain did, and how others rephrased them, as provided for at Brussels, and gave them what one might call a national costume —a source of incipient divergency.

In this situation Dr. Götz has performed a real service by creating in Germany sympathy and understanding for the way in which the common law courts construe the Hague Rules. He also joins those who would like to see the choice by parties to the contract of affreightment of the law of a country in which the Hague Rules do not apply made illegal as contrary to public policy. Dr. Markianos, too, draws attention to the confusion caused by clauses in bills of lading choosing a law other than that of the country in which the document is issued.

On the other hand, he describes how some laws have used the opportunity created by the enactment of the Hague Rules to effect a reform of their law of sea carriage generally by extending the bill of lading rules to charterparties either absolutely or subject to agreement to the contrary by shipowner and charterer. This is an interesting development, which has its parallel in the United Kingdom law of carriage by air. It is also in line with the tendency in common law countries to incorporate bill of lading clauses in charterparties. Incidentally, Dr. Markianos finds it strange that Greece, a country with strong shipowning as opposed to shippers' interests, should have thus increased the carrier's liability; but surely the biggest Greek shipowners have registered their ships elsewhere, and Greek lawmakers are presumably swayed more by considerations of what is equitable than by pressure groups.

It is a pity that these two books, especially that by Markianos, which contains a mass of information of interest to the English lawyer, both practitioner and academic, are not easily accessible in this country. Markianos' book also contains a very useful table giving the sections of the various national laws that correspond to clauses of the Hague Rules. Dr. Götz's book would also be useful since it painstakingly assembles the Commonwealth and U.S. case law. The trouble is not only that the two books are not written in English, but also that the subject is presented in a manner familiar to Germans, which means that everything is related to theory, a method excellent in itself but liable to make foreign readers a trifle impatient. This is not intended as a criticism but rather as an indication of the effort which both authors have made to bring the importance of the subject home to their fellow lawyers.

O. C. Giles.

Most of my Murders. By John Parris. [London: Frederick Muller, Ltd. 1960. 288 pp. 18s. net.]

Hume: Portrait of a Double Murderer. By John Williams. [London: Heinemann. 1960. 248 pp. £1 1s. net.]

The first of these books is described by the publishers as being the inside stories of eleven famous murder trials in which the author appeared for the

defence. Unlike many books of its class the points of law, evidence and procedure (good and bad) are clearly brought out. The last chapter contains some general observations on the criminal Bar, capital punishment and other matters. The second book recounts, somewhat in the form of a novel based on the criminal's own confessions, the circumstances of a murder to which he was an accessory after the fact and of other offences, including murder, committed after his release from prison.

W. H. D. W.

South Africa and World Opinion. By Peter Calvocoressi. Issued under the auspices of the Institute of Race Relations. [Oxford: at the University Press. 1961. 68 pp. 6s net.]

This booklet provides a lucid and concise account of the reaction of world opinion to the Sharpeville incident early last year. It proceeds to analyse the prospects of the various courses which have been taken to persuade or compel South Africa to abandon its racial policies and concludes with the suggestion that organised action be taken in the name of the United Nations under the direction of the Secretary General.

J. U.

Books and Publications Received

Chitty on Contracts, Vols. 1 and 2. Sixth Cumulative Supplements to the 21st edition. By F. Maurice Drake, m.a. (To September 1, 1960.) Sweet & Maxwell, Ltd. Supplements to Vols. 1 and 2 together: 7s. 6d.

Clerk & Lindsell on Torts. Sixth Cumulative Supplement to the 11th edition. By F. Maurice Drake, m.a. (To September 1, 1960.) Sweet & Maxwell, Ltd. 7s. 6d.

Charlesworth on Negligence. Fourth Cumulative Supplement to the 3rd edition. (To September 1, 1960.) By R. A. Percy, m.a. Sweet & Maxwell, Ltd. 7s. 6d.

Documents on the St. Lawrence Seaway. A Selection of Documents edited by R. R. Baxter. Published under the auspices of the British Institute of International and Comparative Law. 1960. 85 pp. Stevens & Sons, Ltd. 10s.

Die Ausnahmetarife im Recht der Europäischen Gemeinschaft für Kohle und Stahl. By Hans-Jürgen Schlochauer. 51 pp. Vittorio Klostermann. Frankfurt am Main. DM. 5.

First Supplement to Dymond's Death Duties, 13th edition. By Reginald K. Johns, ll.b. 1960. xi and 61 pp. The Solicitors' Law Stationery Society, Ltd. 9s. 6d.

The British Council Annual Report, 1959–1960. iv and 110 pp.

Law and Legislation in the German Democratic Republic. 1960. 78 pp. Editors: Association of German Democratic Lawyers, Berlin C2, Neue Königstr.40.

CORRESPONDENCE

THE EDITOR,

The Modern Law Review.

Sir,

In the May 1959 issue of the *Modern Law Review*,[1] Mr. Furmston discusses the proof of foreign law in English courts, with particular reference to the decision of Danckwerts J. in *Re Sebba*,[2] in which the particular point was proof of Canadian Provincial Statutes. When hearing an application for confirmation of a provisional maintenance order made in New Zealand, which came before me in the Children's Court at Canberra recently, I had occasion to examine the extent of my ability to refer to statutes and other sources of law from the parts of the British Commonwealth which are parties to the reciprocal arrangements for making and enforcement of maintenance orders. In the result, I think that both Mr. Furmston's note and the dicta of Danckwerts J. on this point in *Re Sebba* may be to some extent misconceived, so far as the proof of British Commonwealth law is concerned. So far as I know, the Evidence (Colonial Statutes) Act, 1907, is still in force in the U.K., and section 1 amply authorises an English court to receive in evidence the statutes of "British possessions" bearing the imprint of an appropriate Government Printer, which is in effect all that Danckwerts J. did; Colonial and Dominion legislation has similarly been considered, without expert evidence but possibly with at least the acquiescence of the parties in *Re Wheat* [3] and in *Harris* v. *Harris*.[4] Agreement of the parties, however, could not explain a similar reference to Transvaal law in *Haig* v. *Haig*,[5] where the respondent was not represented. In none of these cases was any reference made to the Evidence (Colonial Statutes) Act, though it would appear that in each of them that Act was sufficient authority for the reference to "Colonial" statutes which took place.

In the jurisdiction in which I was sitting, an even more convenient statutory provision operated, one which could with advantage be adopted in the U.K. and in all other parts of the Commonwealth where no similar provision now applies. It is section 19 of the N.S.W. Evidence Act, 1898–1954, which runs as follows:

"19.—(1) Evidence of any statute, code, or other written law of any part of the British dominions other than New South Wales, or of any foreign State, may be given by the production of a printed copy in a volume of such statute, code, or law, either—

(*a*) purporting to be published by the authority of the Government of such part of the said dominions, or of such State, or

(*b*) proved to the satisfaction of the Court to be commonly admitted as evidence in the Courts and Judicial tribunals of such part of the said dominions, or of such State.

"(2) Evidence of the unwritten or common law of any such part of the said dominions, or any such State, may be given by the production of a book of reports of cases adjudged in the Courts thereof, purporting or proved to the satisfaction of the Court to be authorised reports."

G. SAWER.

1 22 M.L.R. 317.
2 [1959] Ch. 166.
3 [1932] 2 K.B. 716.
4 [1949] 2 All E.R. 318.
5 [1937] 2 All E.R. 539.